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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1945**

**No. 41**

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**CHESTER G. BOLLENBACH, PETITIONER,**

**vs.**

**THE UNITED STATES OF AMERICA.**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT.**

---

**PETITION FOR CERTIORARI FILED FEBRUARY 27, 1945.**

**CERTIORARI GRANTED APRIL 2, 1945.**

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- B—Picture of the defendant Burns, marked in evidence at folio 203 (omitted pursuant to stipulation).
- C for Ident.—Pages of note book of witness McDougall, marked in evidence at folio 806 (omitted pursuant to stipulation).
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# United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

*Appellee,*

*v.*

CHESTER G. BOLLENBACH,

*Defendant-Appellant,*

and

GEORGE A. TURLEY, PETER W. BURNS,

HERRERT G. JACOBSON, FRED BLASER and

ERNEST D. INGALLS,

*Defendants.*

2

## Statement Under Rule 13

The defendant Chester G. Bollenbach appeals from a judgment of conviction entered November 30, 1942, in a case tried before the Honorable Grover M. Moscovitz, United States District Judge, sitting in the Southern District of New York, and a jury.

3

The indictment (C 106-171), was filed sealed on November 3, 1939 and was ordered opened on November 8, 1939. It contained two counts charging the defendants with transporting and causing to be transported stolen bonds in interstate commerce and conspiring so to do in violation of Title 18, Sections 415 and 550 and Title 18, Section 88, U. S. C.

The defendant Chester G. Bollenbach was arrested and on November 10, 1938, pleaded not guilty and was admitted to bail in the sum of \$2,500. A severance was granted on December 8, 1941 as to the defendant Bollenbach, and the other defendants proceeded to trial at that time.

5 The trial of the defendant Bollenbach commenced on November 23, 1942 and continued to and including November 30, 1942, when a jury returned a verdict of not guilty on count number one or the substantive count, and guilty on count number two or the conspiracy count. On November 30, 1942, the defendant Bollenbach was sentenced to two years and fined Ten Thousand Dollars (\$10,000), the defendant to stand committed until the fine was paid.

Notice of appeal was filed by the defendant Bollenbach on December 3, 1942. On December 30, 1942, Judge Moscowitz signed an order extending the time for Chester G. Bollenbach to file a bill of exceptions and assignment of errors to March 1, 1943, and extended the time to file the record on appeal to April 1, 1943.

6 On February 23, 1943, the Honorable Jerome N. Frank, United States Circuit Judge, signed an order extending the time of the defendant Bollenbach to file an assignment of errors and bill of exceptions and the record on appeal to May 1, 1943.



## Indictment

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District upon their oath present:

8

That heretofore, to wit, from on or about *January 4, 1937 up to and including February 8, 1937*, both dates inclusive, the exact date being to the Grand Jurors unknown, George A. Turley, Chester G. Bollenbach, alias Walter T. Roberts, alias Mr. Brown, Peter W. Burns, alias Arnold Berendson, Herbert G. Jacobson, Fred Blaser and Ernest D. Ingalls, the defendants herein, unlawfully, wilfully and knowingly did transport and cause to be transported in interstate commerce, securities of the value of \$5,000 and more, which had heretofore been stolen, knowing the said securities to have been so stolen, that is to say, that the defendants did transport and cause to be transported from the City of Minneapolis, Minnesota, to the City, State and Southern District of New York and within the jurisdiction of this Court, securities of the value of \$5,000 and more, to wit, twenty-five \$1,000 Minnesota & Ontario Paper Co. gold notes, interest rate 6%, due March 1, 1931, having the serial numbers 1021, 1022, 1023, 1024, 1025, 2900, 2901, 2950, 2006, 2007, 2061, 2062, 1189, 2888, 3480, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316 and 3317, which securities had theretofore been stolen from the office of the Clerk of the United States District Court in Minneapolis, Minnesota.

9

That the defendants, at the time and place aforesaid, did transport and cause to be transported the stolen securities in interstate commerce as aforesaid knowing the same to have been so stolen; against the peace of the United States and their dignity and contrary to the statute of the United States in such case made and provided. (Sections 415 and 550, Title 18, United States Code.)

## SECOND COUNT

11

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, commencing on or about *January 1, 1937 and continuing up to January 1, 1938*, at the Southern District of New York and within the jurisdiction of this Court, George A. Turley, Chester G. Bollenbach, alias Walter T. Roberts, alias Mr. Brown, Peter W. Burns, alias Arnold Berendson, Herbert G. Jacobson, Fred Blaser and Ernest D. Ingalls, the defendants herein, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States, to wit, to violate Section 415, Title 18, United States Code.

12

It was part of said conspiracy that after the bonds had been stolen from the office of the Clerk of the United States District Court in Minneapolis, Minnesota, the defendants would transport and cause to be transported in interstate commerce; twenty-five Minnesota & Ontario Paper Co. gold notes, 6%, due March 1, 1931, of the value of \$5,000 and more, to the City, State and Southern District of New York and within the jurisdiction of this Court, knowing the same to have been so stolen.

## Indictment

13

## OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about February 3, 1937, George Turley had a conversation with Fred Blaser and Ernest Ingalls at George Turley's law office, located at 521 Fifth Avenue, in the City and State of New York.

2. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, Fred Blaser and Ernest Ingalls had a conversation with Chester Bollenbach at the office of Blaser & Ingalls, located at 32 Broadway, in the City and State of New York, on or about February 5, 1937.

3. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about February 11, 1937, Fred Blaser, Ernest Ingalls, Chester Bollenbach, George Turley and Peter W. Burns had a conversation at George Turley's law office, located at 521 Fifth Avenue, in the City and State of New York.

4. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about February 5, 1937, Herbert G. Jacobson, George Turley, Peter W. Burns and Chester Bollenbach had a conversation at Schwartz's Restaurant in the City and State of New York.

16

*Indictment*

5. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about *February 5, 1937*, Herbert G. Jacobson and Peter W. Burns went to the office of Manning & Company, located at 80 Wall Street, in the City and State of New York.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such cases made and provided. (Section 88, Title 18, United States Code.)

17

JOHN T. CAHILL,  
United States Attorney.

18



# Testimony

19

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before:

HON. GROVER M. MOSCOWITZ, D. J.,  
and a Jury.

New York, November 23, 1942;  
10:30 o'clock A. M.

20

## APPEARANCES:

MATHIAS F. CORREA, Esq., United States Attorney, for  
the Government; SAMUEL H. REIS, Esq., Assistant  
U. S. Attorney, of Counsel.

LEO C. FENNELLY, Esq., Attorney for Defendant.

(Mr. Reis made an opening statement to the jury on 21  
behalf of the Government, during which the following oc-  
curred:)

Mr. Reis: Now as the case will be developed, the Gov-  
ernment will prove that this was not the first courthouse  
and clerk's office from which bonds had been stolen by this  
defendant and others.

Mr. Fennelly: I move right now for the withdrawal of  
a juror and a mistrial.

The Court: Motion denied.

Mr. Fennelly: Exception.

Mr. Reis: We will show—

22

*Armin M. Johnson—for Government—Direct*

The Court: That is what the Government expects to prove, if the evidence is admitted by the Court.

Mr. Reis: We will also show that the scheme set up by these defendants, there was a scheme by this defendant and others to steal 20 bonds from the Clerk of the Chancery Court in Wilmington, Delaware, 20 bonds of the General Theatre Equipment Company.

Mr. Fennelly: I renew my motion. The prosecutor has no right to say that. I respectfully move for the withdrawal of a juror.

23

The Court: Denied.

Mr. Fennelly: Exception.

Mr. Reis: As this case will develop, you will see that the claim, the scheme, is to set up alibis when the proper authorities begin to investigate this case, so that they might cover up their actions. Everything that I have said to you I intend to prove during the course of this trial.

(Mr. Fennelly made an opening statement to the jury on behalf of the defendant.)

24

ARMIN M. JOHNSON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Johnson, what is your profession? A. I am an attorney.

Q. How long have you been admitted to the Bar? A. Since the 1st of October of 1934.

Q. What State are you admitted to practice law in? A. In Minnesota.

Q. Were you connected with the firm of Cobb, Hoke, Benson, Krause & Faegre? A. Yes.

Q. You were connected with the firm I just mentioned?

A. Yes, sir.

Q. Was that firm the attorneys for the trustees in bankruptcy of the Minneapolis & Ontario Paper Company that was in bankruptcy in the United States District Court in Minneapolis? A. Yes. The correct name is the Minnesota & Ontario Paper Company.

Q. I stand corrected. Pursuant to request of Mr. Faegre did you examine the files of the Minnesota & Ontario Paper Company in the bankruptcy clerk's office in the United States District Court? A. Yes.

26

Q. Pursuant to your investigation did you make a memorandum—

Mr. Fennelly: May we have the date fixed?

Mr. Reis: On January 26, 1935.

The Court: Can you fix the time?

The Witness: I know it was in January, 1935.

Q. I show you this paper. Pursuant to your investigation that you made in the United States District Court did you get up that memorandum? A. Yes, sir.

The Court: If it refreshes your recollection, 27  
state what you did.

The Witness: I went to the office of the United States District Court clerk and examined the files to determine whether there were in these files, the basis of the claim, to which had been attached the original securities, and if such securities had been detached in the files, and to make a list of them.

The Court: Tell us what you did in the office.

The Witness: That is precisely what I did. I made a list of all securities which I found in those files.

28

*Armin M. Johnson—for Government—Direct*

The Court: When was that?

The Witness: That was in January, 1935.

Q. Pursuant to that did you draw up a memorandum?  
Did you draw up a memorandum for Mr. Faegre? A. Yes.

Q. Is that the memorandum? A. Yes.

Q. Does that reflect the numbers of the securities that you found in the file? A. Yes.

(Marked Government's Exhibit 1 for Identification.)

29

Q. Will you look at this paper to refresh your recollection and tell the jury what bond numbers you saw attached to the proofs of claim?

Mr. Fennelly: I object to it.

The Court: On what ground?

Mr. Fennelly: Incompetent.

The Court: That does not mean anything. Why is it incompetent?

Mr. Fennelly: In point of time. It is in 1935. The indictment is laid in 1937.

30

The Court: Overruled—I thought you had finished.

Mr. Fennelly: For a different reason: That something he writes down is hearsay.

The Court: He says that is what he saw.

Mr. Fennelly: Yes, your Honor.

The Court: He says he found it in the clerk's office.

Mr. Fennelly: The best evidence is the record from the claims.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. Will you give us the bond numbers, what you found?

A. The bond numbers are as follows, Gold Notes Nos. 1787 for \$1,000; 1781 for \$1,000; 1782, 1783, 1784—

The Court: Slowly.

A. (Continuing) —No. 1389, No. 1390, of \$1,000 Gold Notes.

Then of Bond Series A, No. 2117 for \$100. The following Gold Notes for \$1,000 each: No. 1189, No. 2888, Nos. 1021 to 1025 inclusive, Nos. 2061 and 2062, No. 2901, No. 2950, No. 2006, No. 2007, No. 2900, No. 3480, and Nos. 3308 to 3317 inclusive.

32

Q. Now as to the numbers you read, 1787 and down to 1390, did they belong to the bank?

Mr. Fennelly: I object.

The Court: You mean the bonds?

Mr. Reis: No, the claim.

The Court: On file?

Mr. Reis: Yes.

The Court: I will let him state what the file shows. Have you got the original file?

Mr. Reis: No, they were stolen, Judge, the proofs of claim, with the bonds.

The Court: I will let you show that.

33

Mr. Reis: Yes.

The Court: I will take it subject to connection.

Mr. Fennelly: Exception.

The Court: Go ahead.

A. The numbers to which you referred were Gold Notes owned by the LaConnor State Bank of LaConnor, Washington.

Q. Who did the other notes belong to—withdrawn.

Who were the claimants? A. The \$100 note, 2117, filed by J. J. Courtney.



34

*Armin M. Johnson—for Government—Direct*

A. (Continuing) The \$100 note filed by J. J. Courtney of Duluth, Minnesota.

The First Service Corporation of Minneapolis, Minnesota, filed claims on behalf of the following banks: First National Bank of Rolla, North Dakota, Gold Notes Nos. 1189, 2888, each for \$1,000—

A. (Continuing) The next bank was the First National Bank of Rochester, Minnesota.

35

Mr. Reis: I would like to know if the jury has—the first bank. It is the First National Bank of Rolla, North Dakota, and the number of the bonds—

The Court: Repeat it.

The Witness: The First National Bank of Rolla had Gold Notes Nos. 1189 and 2888.

The First National Bank of Rochester, Minnesota, had Gold Notes 1021 to 1025, inclusive.

The Merchants National Bank of Cavalier, North Dakota, had notes 2061 and 2062, each for \$1,000.

The First National Bank of Miles City, Montana, had notes 2901 and 2950.

36

The First National Bank of Park River, North Dakota, had gold notes 2006, 2007 and 2900.

Frederick Agather of Sauk Rapids, Minnesota, filed claim on gold note No. 3480, for \$1,000.

The First National Bank of Great Falls, Minnesota, had gold notes Nos. 3308 to 3317.

Q. You said that one of these notes was a \$100 note. Which one was that? A. The bond filed by J. J. Courtney of Duluth, Minnesota.

Q. I show you these bonds and ask you if you can identify them as the bonds that you had seen on file at the United States District Court when you made your inspection?

The Witness: Those are some of the notes.

Mr. Reis: I now offer 1022, 1023, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316 and 3317. I now offer those notes in evidence.

Mr. Fennelly: May I see them?

Mr. Reis: Yes (handing).

Mr. Fennelly: Twelve of them?

Mr. Reis: Yes.

Before I offer these, may I have this witness look at a photostatic copy of the other bonds and see if those numbers coincide?

38

The Court: You better mark this first.

Mr. Reis: Mark this as Exhibit 2.

(Marked Government's Exhibit 2.)

The Court: What is the question?

Mr. Reis: Can he identify these photostats as copies of the notes that he had seen in the courthouse, by looking at the numbers.

The Witness: Yes, sir.

Mr. Reis: I offer these photostatic copies in evidence.

Mr. Fennelly: Object to them as incompetent.

39

The Court: Same ruling.

Mr. Fennelly: No foundation laid. Exception.

The Court: Taken subject to connection.

(Marked Government's Exhibit 3.)

Q. Did you put your initials on these papers? A. Yes, sir.

Q. Where did you put them on? A. In one of the offices in this courthouse.

Q. That was not during the time you testified in the

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*Thomas H. Howard—for Government—Direct*

other trial? A. No, sir. That was in April of 1941, I believe.

Mr. Fennelly: No examination.

THOMAS H. HOWARD, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

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Q. Mr. Howard, what is your occupation, sir? A. Clerk of the United States District Court for the District of Minnesota.

Q. How long have you been clerk of that court, Mr. Howard? A. Since July of 1939.

Q. And prior thereto— A. I was Chief Deputy Clerk of that court.

Q. Minneapolis, Minnesota? A. At Minneapolis.

The Court: For how long? What period?

The Witness: From approximately 1933.

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Q. How long have you been connected with the United States District Court? A. Since 1914.

Q. The United States District Court in Minneapolis has two circuits, in St. Paul and in Minneapolis?

The Court: Two what?

Mr. Reis: Two circuits.

A. The district is commensurate with the State of Minnesota. The jurisdiction of the United States District Court of the District of Minnesota is commensurate with the State boundaries. That district is divided into six divisions.

Minneapolis is located in the Fourth Division of the District.

Q. In that district was there a bankruptcy proceeding known as the Minnesota & Ontario Paper Company? A. Yes, sir.

Q. Did you have occasion to see any proofs of claim and the bonds attached thereto in connection with that bankruptcy proceeding? A. Yes.

The Court: What is the number of that proceeding?

Mr. Reis: The bankruptcy proceeding? 11,640 in Bankruptcy, the Fourth Division of the Minnesota United States District Court.

The Court: And the correct name is what?

Mr. Reis: Minnesota & Ontario Paper Company.

Q. When did you see those bonds that were filed in that proceeding, Mr. Howard? A. Well, they came in at different times after the order of the filing of claims was made. I do not remember just what intervals I saw them.

Q. But you did have occasion to see them? A. Oh, yes.

Q. They were on file with the papers in that proceeding? A. Yes, sir.

Mr. Fennelly: Has the witness testified that they were there and that he saw them on file?

The Court: Did you see them on file?

The Witness: Yes, your Honor.

The Court: All right.

Q. Did you have occasion to order any of your clerks to return those bonds on file to anyone? Let me refresh your recollection. I show you this order. A. I am just waiting for the Court.

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*Thomas H. Howard—for Government—Direct*

Mr. Reis: I am sorry.

Mr. Fennelly: I object to the question.

The Court: Let me have the last question.

Q. (Read.)

The Court: It is subject to connection.

Mr. Fennelly: Exception.

A. I had no authority to order them returned except on the Court's order.

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Q. Was there such an order? A. There was.

Q. I show you a certified copy of an order and ask you if that is the order that you referred to? A. Yes.

Mr. Reis: I offer this in evidence (handing to Mr. Fennelly).

The Court: What is the date of that?

Mr. Reis: Filed April 8, 1937.

(Marked Government's Exhibit 4.)

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Q. Mr. Howard, after you received this order, Government's Exhibit 4, what did you do? A. I awaited any applications for the return of such securities as might be attached to certain claims.

Q. Were there applications made to you? A. There was one application that I remember.

Q. At or about that time? A. Soon after the order was made.

Q. What did you do? A. Naturally I wanted to find the securities in question before I could comply with the request that they be returned, and was unable to find them in my file.

Q. You were unable to find the securities? A. Yes, sir.



Q. What did you do then? A. Made a very intensive search for them, without success.

Q. Did you order your clerk, Mr. Smith, to make a search, Mr. Chell Smith? A. No.

Mr. Fennelly: I object.

A. (Continuing) No, I conducted the search myself.

Q. You did not find any bonds? A. I did not find any.

Q. Or any of the securities that had been filed, is that correct? A. I did not find the claims or the attached securities. 50

Q. So you could not find the proofs of claim or find the securities?

The Court: He said that he searched for them, made an intensive search, and did not find them.

Q. Do you have any independent recollection of which bonds had been missing from the files? A. Yes, I have.

Q. Will you refresh your recollection and tell us? A. From my notes may I do that?

Q. In order to refresh your recollection, I show you a letter that you gave to me. Does that refresh your recollection as to the bond numbers and on whose behalf they were filed? A. Yes, sir. 51

Q. All right, sir. Can you tell us? A. What was your question?

Mr. Reis: Will you read the last question, Mr. Reporter?

Q. (Read.) A. I will give you the name of the claimant and the amount?

Q. Yes. A. The First National Bank of Rochester, Minnesota, \$5,000, which represented the face value of five gold notes.

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*Thomas H. Howard—for Government—Direct*

The First National Bank of Rolla, North Dakota, \$2,000, the equivalent of two such gold notes.

The First National Bank, Park River, North Dakota, \$3,000, representing the face value of three of such notes.

The Merchants National Bank, Cavalier, North Dakota—

Mr. Fennelly: The witness has not been refreshing his recollection. He is reading from some paper. I do not know what it is.

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The Court: He used it to refresh his recollection.

Mr. Fennelly: Don't you think we should have it marked for identification?

The Court: What are you using to refresh your recollection?

The Witness: I could have used my memory, but I made a memorandum.

The Court: You may proceed.

Mr. Fennelly: May we have it marked for identification, whatever he is using to refresh his recollection?

The Court: Yes. He will be through in just a moment.

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(Record read.)

A. (Continuing)—\$2,000, representing the face value of two gold notes.

The First National Bank of Miles City, Montana, \$2,000, representing the face value of two of such gold notes.

The First National Bank of Great Falls, Montana, \$10,000, representing the face value of ten such gold notes.

An individual by the name of Frederick Agather, of Sauk Rapids, Minnesota, \$1,000, representing the face value of one such gold note; aggregating in all \$25,000.

Q. Mr. Howard, did you give anyone permission to take those gold notes from the courthouse? A. No.

Mr. Reis: You may inquire.

*Cross examination by Mr. Fennelly:*

Q. Are you familiar with the physical arrangement of the clerk's office at Minneapolis, the courthouse? A. I am.

Q. I wonder if you would be good enough to draw a diagram for us of the courthouse.

The Court: You mean the courthouse? 56

Mr. Fennelly: Yes, the courtroom outside of the clerk's office.

Mr. Reis: The courtroom? We are talking about the clerk's office.

Q. The clerk's office where these papers were kept.

The Court: Is there one large clerk's office?

The Witness: A suite of offices, your Honor.

The Court: Can you draw a diagram of those?

The Witness: Yes, sir.

The Court: Of the clerk's office. 57

Q. I wonder if we could start with the outside corridor and show the entrances.

The Court: Let him draw the diagram. He may make it as you want it.

The Witness: The entrance to the building?

Q. No, the clerk's office. It is on a certain floor in this building? A. Yes, sir.

Q. What I would like you to draw for us is this office showing the entrances to the offices and then I will ask you

58 *Thomas H. Howard—for Government—Cross*

to fix certain things inside of it, after we have the physical layout.

Mr. Reis: Is that in February of 1937?

Q. In 1937, at the time of the event. A. I will just first draw the full area and then insert various things.

The Court: Will that take a little while?

The Witness: No, a very few minutes, I think.

(Witness draws diagram.)

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That is approximately the layout, Mr. Counsel.

Q. I wonder if you would indicate on here where is the entrance from the public corridor outside of the clerk's office. A. It might be

Q. Will you please indicate on here and mark with the words "Entrance to public corridor" on the diagram. A. From the office into the corridor?

Q. Yes, into the public corridor. A. (Witness complies.)

60

Q. Where is the public corridor on that diagram? I think you better write "Public Corridor." A. This is the center. The square represents the well in that building.

The Court: One of those old-fashioned post office buildings?

The Witness: Yes.

Q. Mark on that "Well." A. Yes. (Witness complies.) And then the corridor goes around the well.

Q. Which one of these rooms embraces the clerk's office?

Mr. Reis: Which clerk's office do you mean?

Mr. Fennelly: The clerk of the District Court. I am coming to that. Where those files were kept.

A. The clerk has a suite there of five offices, separate rooms which follow on, the first of which is 401, 402, 403, and 404, and then after an interval No. 406, which is in this corner (indicating).

Q. Yes. Each of these rooms that you have indicated, 401, 402, 403 and 404, they have each separate entrances into the main corridor? A. They have, but we never used it. We kept the doors locked. Our entrance was inside and the entrance was to 401, 404 and 406. 62

Q. Did the bankruptcy clerk have a part or portion of your office? A. No.

Q. Were the files in the bankruptcy matters kept in any particular place? A. Depending on where we could find room for them, because we were very crowded.

Q. In 1937 where was it that those files were kept, in this Minnesota & Ontario Paper Company case, to which you have testified? A. My recollection is that they were in Room 406.

Q. That is the room that you have marked here (indicating)? A. Yes, sir. 63

Q. How many entrances has that room? A. Just one.

Q. In 1937 who occupied that room? Any employees of the Government? A. No.

Q. No one? A. Except as one of the attendants had occasion to go in there, but we had no clerk permanently there. It was used as a file room.

Q. How many employees were there in the United States Clerk's office in 1937 in January or the first of February? A. Six.

Q. Six? A. Yes.

Q. What were their names? A. Well, I was in charge.



I was the chief deputy there. Then I had a deputy whose name is Chell M. Smith. I had a deputy by the name of Mary E. McCrea; another named Frances M. Baxter; another one, Gladys A. M. Rippe.

How many is that, Mr. Reporter?

The Reporter: Five.

A. (Continuing) I do not recall the other one at the present moment. I think there has been a change there.

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Q. Was it a man or woman? A. A woman.

Q. Mr. Howard, do you recall her name? A. Not just now. It will come to me, perhaps.

Q. Was there any entrance into these rooms between Nos. 401 and 402, inside of the public corridor? A. Yes, sir, right through.

Q. An entrance from each of the rooms from 401 to 404? A. Yes, sir, inside the suite.

Q. Inside? A. Yes, sir.

66

Q. Was there any railing inside of these rooms or any partition to keep the public out, any particular place? A. In 401 there is a counter. It is a rather long room. That is where the general corridor is. I have just marked that space. It is a rather long room with a long counter. That is intended to keep the public at bay.

Q. The public came into Room 401 and there they find a counter and they cannot go beyond it into the room? A. Except at the end of the counter there is a small gate, through which we in our discretion might allow them to come through.

Q. The means of going from room 401 to 402 is behind the counter, is it, for the use of the clerks of the court?

A. Yes, there is an archway between 401 and 402, and between 402 and 403, and between 403 and 404.

Q. But that, as I understand it, is inside of the counter, in the part reserved for the business of the clerks' office, is that correct? A. The counter only extended only the length of room 401. The other three rooms had no counters. They were all open.

Q. In 401, room 401, was the entrance from 401 to 2 behind the counter? A. Yes, at the end of the counter, just behind the gate that I spoke of.

Q. In room 402 you say there was no counter or railing?  
A. No.

Q. Nor 403? A. No.

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Q. How about 404? A. Nothing in 404.

Q. And 406? A. It was an open room.

Q. In 1937, in January, which of these rooms did you have a desk in, if any? A. My desk was in 402.

Q. Would you mark, please, on there where your desk was? A. Yes (marking on diagram).

Q. Were there any other desks in that room besides yours? A. Yes, there was a desk here (indicating).

Q. Whose desk was that? A. That was occupied by Mr. Smith, whom I have mentioned.

Q. Anyone else in that room? A. No one else in that room.

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Q. In room 401, were there any desks in that room?  
A. Yes, sir.

Q. Would you locate them and tell us whose they were?  
A. One at this end and one here (indicating). My recollection is that the end desk was occupied by my deputy, Miss Rippe, and the other desk by my deputy, Mary McCrea.

Q. I wonder if you would be so good as to indicate with an arrow each of the desks and the names of the people who occupied them at the time? A. Yes. I will

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*Thomas H. Howard—for Government—Cross*

just show their last name, because I have described their full name.

Mr. Reis: I think you better write it out.

The Witness: I have accounted for four people.

Q. You are familiar with them but we are not acquainted with them. This is your desk (indicating)? A. Yes.

Q. Will you put an arrow down here indicating that it is your desk? A. (Witness complies.)

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Q. Write "desk" out. A. (Witness complies.)

Q. You do not mean that you wrote his name out, Mr. Smith, I believe, is that right? A. Yes, sir. This is Mr. Smith's. You want my full name?

Q. Put an arrow down here. There is more room here (indicating). A. All right. (Witness complies.)

Q. Was there anyone else who used room 401 at the time other than the two names that you have put on there? A. No.

Q. In room 403 did anyone occupy that and have a desk in it? A. No.

Q. No one at all? A. No, sir.

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Q. In room 404? A. There were two desks there (indicating). Now one of those was the desk of Frances Baxter and the other desk is the desk of the other deputy whose name I cannot recall just now.

Q. In room 401, was that the room where they had the sign "Entrance" marked outside, the entrance to the clerk's office? A. No, there is no sign, but that is the recognized entrance. It is the first door the public comes to after leaving the elevator.

Q. 401? A. Yes.

Q. That is the room that people come into to make inquiries, in the clerk's office? A. Yes. The desk indicates that that is where business was transacted. That was the usual thing to do.

*Thomas H. Howard—for Government—Cross*

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Mr. Fennelly: May I have this marked for identification, please?

The Court: Put it in evidence. Mark it in evidence.

Mr. Fennelly: All right, mark it in evidence.

(Marked Defendant's Exhibit A.)

Q. As a matter of fact, no one had to file bonds with these claims in this bankruptcy proceeding, did they? A. No, it was not necessary so far as I am informed.

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Mr. Fennelly: That is all.

Mr. Reis: Mr. Howard just informed me that he now recollects the name of the other deputy.

The Court: You may step forward. Mr. Howard, what is the name?

Mr. Howard: The missing deputy is a young lady named Glenna Gray, and she occupied the desk there in room 406, Mr. Counsel, which I did not occupy for you—404, I think it was. (Marks on diagram.) That accounts for all of them.

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THOMAS H. HOWARD, resumed the stand.

*Cross examination continued by Mr. Fennelly:*

Q. May I inquire whether the witness' recollection was refreshed by himself or whether someone aided him. A. I will confess that I was aided.

*By Mr. Reis:*

Q. Who aided you? A. It was only a matter of doing a little thinking on my own part. I ought to have remembered my own deputies' names.

*Laurence B. Hogue—for Government—Direct :*

Mr. Fennelly: I agree with that. I was just interested in knowing whether you were aided.

*By Mr. Reis:*

Q. May I ask who refreshed your recollection? A. I met Mr. Johnson over there. I was rather embarrassed that I could not think of the name of my missing girl, and I mentioned about the deputy when I was in the witness room and Mr. Johnson came to my rescue.

LAURENCE B. HOGUE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Hogue, what is your occupation? A. Banking.

Q. With what companies are you connected? A. I am secretary of the First Bank Stock Corporation. I am secretary of the First Service Corporation of Minneapolis.

Q. Was that a holding company? A. That is a holding company, and it owns the stock of the First National Bank of Rolla, North Dakota, a subsidiary wholly owned by the First Bank Stock Corporation, which renders service to the banks.

Q. Did you on behalf of the First Bank Stock Corporation have any proofs of claim filed with gold notes attached thereto in the bankruptcy proceeding known as the Minnesota & Ontario Paper Company? A. I did. In addition to being on behalf of the First Bank Stock Corporation, they were also on behalf of several affiliated banks.

Q. Can you tell by your own independent recollection what gold notes and what proofs of claim you had filed



in the bankruptcy proceeding, or would you have to refresh your recollection from notes? A. I have the numbers of the notes with me.

Q. Where did you get that from? A. The office of the corporation. Do you want that, sir?

The Court: No. Do you remember the numbers without looking at the record?

The Witness: No.

The Court: Look at it and refresh your recollection.

Q. Refresh your recollection and tell the Court and jury what gold notes and what proofs of claim you filed in that bankruptcy proceeding and on whose behalf and what you did. A. On November 30 I filed—

Q. What year? A. I beg your pardon?

Q. What year? A. 1934 I filed on behalf of the First National Bank of Rolla, North Dakota, two \$1,000 gold notes numbered 2888 and 1189.

Q. When you say \$1,000, you mean \$1,000 face value of the gold notes? A. Yes, that is right, \$1,000 each.

On behalf of the First National Bank of Rochester, Minnesota, five gold notes, Nos. 1021 to 1025, inclusive:

On behalf of the Merchants National Bank, Cavalier, North Dakota, gold notes Nos. 2061 and 2062, \$2,000.

On behalf of the First National Bank, Miles City, Montana, \$2,000, represented by Nos. 2901 and 2950.

On behalf of the First National Bank, Park River, North Dakota, three notes, or \$3,000 par value, Nos. 2900, 2006 and 2007.

On December 26, 1934, I deposited with the Clerk of the United States District Court ten gold notes on behalf of the First National Bank of Great Falls, Montana. Those were numbered 3308 to 3317, inclusive, for \$1,000 each.

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*Laurence B. Hogue—for Government—Cross*  
*Chell M. Smith—for Government—Direct*

These banks are affiliates of the First Bank Stock Corporation.

Q. Did you authorize anybody to take those notes from the bankruptcy clerk's office? A. I did not.

Mr. Reis: You may inquire.

*Cross examination by Mr. Fennelly:*

83 Q. Was there a reorganization of this company, the Minnesota & Ontario Paper Company? A. Yes; rather, it was in bankruptcy, in the bankruptcy court.

Q. And the company was reorganized, was it not? A. I believe subsequently, yes.

Q. Can you tell me what was given in exchange for one of these \$1,000 par value bonds?

Mr. Reis: I object.

The Court: Sustained.

Mr. Fennelly: Exception.

That is all.

Mr. Reis: That is all, Mr. Hogue.

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CHELL M. SMITH, called as-a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Smith, what is your occupation? A. Chief Deputy Clerk, United States District Court.

Q. What district? A. District of Minnesota.

Q. Where is that located? A. Minnesota.

Q. Where in Minnesota? A. Minneapolis.

Q. Is there any doubt in your mind that this is the man?

Mr. Fennelly: I object.

A. No.

Mr. Reis: Sir?

Mr. Fennelly: I object to it.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. What was your answer, Mr. Smith? A. Well, I feel quite positive he is. 98

Mr. Reis: You may inquire.

Mr. Fennelly: Will you mark this for identification.

(Marked Defendant's Exhibit B for Identification.)

*Cross examination by Mr. Fennelly:*

Q. I show you, Mr. Smith, Defendant's Exhibit B for Identification. Did you ever see that man before? A. No.

Q. You never did? A. Unless it was in the courtroom here. 99

The Court: What?

Mr. Reis: What is your answer, Mr. Smith?

The Witness: No, I do not think so.

Q. Did you ever see him out in your courthouse in January or February of 1937? A. No, not that I know of.

Q. You are sure of that, aren't you? A. I feel quite certain.

Q. Now what day was it that you saw this man in the courthouse in 1937? A. I do not know.

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*Chell M. Smith—for Government—Cross*

Q. He was looking at some papers in the Minnesota & Ontario Paper Company file? A. I do not know.

Q: Didn't you testify some time last year that at the time you saw this man was on February 1 of 1937? A. No, sir.

New York, November 24, 1942;  
10:30 o'clock A. M.

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Trial resumed

CHELL M. SMITH, resumed the stand.

*Cross examination continued by Mr. Fennelly:*

Q. Mr. Smith, when we closed last night you had just told me that you never testified in the case against the other defendants a year ago; that you had said that you saw this man looking over these files in connection with the Minnesota & Ontario bonds on February 1, 1937. A. That is correct.

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Q. Weren't you asked this question by Mr. Reis at that time on your direct examination and didn't you give this answer:

"Q. You say the man was there in January, the latter part of January, or the first part of February? A. It was on the 1st of February."

A. No, I said the first part of February.

Q. So that the testimony which I am reading to you, question and answer, which Mr. Reis has just loaned to me, this one, you deny that you said that? A. I do absolutely.

Q. If I showed you the printed page—will you look at it?

The Court: Typewritten.

Mr. Fennelly: Typewritten. Excuse me.

Q. (Continuing) —do you think it might refresh your recollection as to whether you did not say it was on the 1st day of February? I am pointing to page 27 of the direct testimony of Mr. Smith, questions by Mr. Reis. (Handing to witness.) Have you read it, sir? A. I have.

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Q. Do you still deny that you said that? A. I do.

Q. Now what day of the week was it that this man, whom you think was Mr. Bollenbach, was in the courthouse when you saw him? A. I do not know.

Q. Was it the beginning of the week or the end of the week? A. I do not know that.

Q. How many people a day come into the United States clerk's office in Minneapolis, or did come in, around January and February of 1937? A. Well, there is a good many coming in the main office for passports and naturalization certificates and applications.

Q. Is that in room 401? A. That is 401.

Q. That is where generally everyone comes in seeking information, isn't that true? A. That is correct.

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Q. Any stranger in town would normally go there to inquire, would he not? A. That is right.

Q. That is room 401? A. That is correct.

Q. Where was it that you first saw this man that you think was Mr. Bollenbach in the courthouse? A. 406.

Q. How was he dressed? A. Well, he had an overcoat on.

Q. What color? A. Dark, a dark overcoat.

Q. Black, blue, brown? A. I do not think it was brown. It was either dark blue or black.



Q. What type of coat was it? A. Well, it had, I think, as I remember it, a kind of a high collar turned down (indicating). It was a medium heavy coat.

Q. With a big collar turned down? A. No, a really large collar.

Q. How large? A. I think it is larger than ordinarily men wear now. He kept his coat on most of the time, as I remember it. You see I saw him.

Q. He kept his coat on when you saw him. Did he have his hat on? A. It seems to me he did.

107 Q. Did he have his gloves on? A. I do not remember about the gloves.

Q. How tall was he, do you recall? A. I think he was a little shorter than I was.

Q. How tall are you? A. 5 feet 11.

Q. Was he sitting or standing when you saw him? A. Standing.

Q. Where was he standing in that room? A. He was standing up near the window, the radiator, on the other side of some filing cases.

Q. Was someone with him? A. Not at the time. Someone came in with me and showed him to me.

108 Q. Someone brought you in there and talked to this man, is that correct? A. That is right.

Q. Who was that? A. I am pretty sure it was Glenna Lee Gray.

Q. Who? A. Glenna Lee Gray. She may have been married then. Her name would have been Tymeson. I am not sure.

Q. Was the maiden name Gray? A. Gray.

Q. Her married name was what? A. Tymeson.

Q. Who was she? A. She was a deputy clerk there.

Q. How do you spell that name, Tymeson? A. T-y-m-e-s-o-n.

Q. She was a deputy clerk there at the time? A. That is correct.

Q. She was the one that you say had seen this man before you did? A. That is correct.

Q. Any question in your mind about, as to who it was? A. She saw him before I did?

Q. Yes. A. Well, she is the one that told me about it. Whether one of the other deputies saw him first, I do not know, if that is what you mean. She is the one that told me about it.

Q. Where was her desk in the courthouse at that time? 110  
A. That would be room 404.

Q. Do you know whether or not she had brought him into room 406 to look at the files? A. I am not positive.

Q. What is that? A. I am not positive. I did not see her do it. I do not remember anyone telling me.

Q. Had any files been looked at by this man before you arrived in the room? Were any files spread out on the desk? A. Yes, that is right.

Q. Someone had already showed him some files, isn't that right? A. That is right.

Q. Do you know who it was that showed him the files? A. No, I could not say positively. 111

Q. Was it this Miss Gray? A. It was either her or one of the others. I do not know. She is the only one that told me about it.

Q. Do you know whether anyone else showed him files? A. No, I do not.

Q. This Miss Gray was the one who was in the room with him before? A. She was in the room, that came into the room when I came in.

Q. Yes. Wasn't Miss Williams there? A. Miss Williams?

Q. Yes. A. Never heard of Miss Williams.

Q. Didn't you testify in the last trial that there was a Miss Williams in the room? A. No. I certainly know the deputies in the office.

Q. When I say "the last trial" I refer to the trial of the other defendants. Don't you remember being asked this question by Mr. Reis and giving this answer:

"Q. Was there anyone in the room with him when he examined the file, or did you leave the file completely in his custody? A. Well, there was another deputy clerk with him at first.

"Q. What is his name? A. Miss Williams.

"Q. A lady? A. Yes, sir."

Did you give that testimony? A. I did not.

Q. Did you say that there were some files spread out on a desk or table in that room when you went there? A. There were some on the table.

Q. You do not know what they were, is that correct? A. I am sorry, no.

Q. You never saw any Miss Williams. Miss Gray walked into room 406, is that correct? A. That is correct.

Q. And she had been in the room, you say, before with this man? A. I did not see that.

Q. Let me see if I understand. I thought you said that she was a deputy clerk, the lady whom you now describe as Miss Gray, and she had been in that room with that man, in room 406, before she came to you. A. You mean is that what I testified to this morning?

Q. That is what I understood. I want to find out whether I am mistaken. I understood you to so testify, A. I do not know whether she was in there before she saw me or not. I could assume so, but I do not know. I did not see her.

Q. Didn't you testify just this morning that before you saw this man that he was with another clerk, a Miss Gray,

in that room? A. No, the first time I saw him he came in with Miss Gray.

Q. Didn't you tell us she had been in the room before and had come to bring you in? A. No.

Q. Just ten minutes ago. A. No, I did not. He has got the record there.

Q. Didn't you testify at the last trial that this other deputy clerk, a lady, was in the room with him at first? A. Williams?

Q. There seems to be some discrepancy about some names. You say Miss Gray. Didn't you testify at the last trial that there was a woman clerk in the room with that man before you went in there? 116

Mr. Reis: I object because he is assuming a fact not in evidence. He said Miss Williams. Now her name is Miss Gray. There is no such testimony. I object to the form of the question.

The Court: I sustain it as to form.

Q. I want to know if you did not testify on the last trial that there was a woman clerk in the room with him, the file room, before you went in there? 117

Mr. Reis: I object. If Mr. Fennelly has the minutes, I ask that he read from the minutes what he testified to.

The Court: Overruled. You have the minutes there?

Mr. Fennelly: Yes. But I want to first question the witness and lay a foundation. That will be, I believe, the proper way to examine him.

A. I am not sure. I do not remember just exactly what I did say a year ago, the exact words.

Q. You do not remember now whether you testified that there was a woman clerk who was in the room, the file room, with the man that you saw, before you went in there? A. No, I do not remember. I may have said it. I do not remember.

Q. Let me read you this question on cross examination:

"Q. Was there anyone in the room with him when he examined the file, or did you leave the file completely in his custody? A. Well, there was another deputy clerk with him first."

119 Do you remember that? A. I will just assume it is. It is possible he came to the first room, 401, and was brought in by another deputy clerk. I do not remember it, but that is possible. That is the usual routine.

Q. Didn't you so testify on the prior trial? A. I may have. I may have.

Q. Will you just read it and see whether or not it does not refresh your recollection about what your testimony was? I refer you to page 30 of these minutes of Mr. Reis', that he has furnished. I refer you to the last question. Read it, please, and see if it does not refresh your recollection (handing to witness). A. Well—

120 Q. Does it refresh your recollection? A. No, but I think I understand what it means now. At first Miss Gray was in there with me as I carried out the files from the safe. She was in there a while.

Q. That is not what it says, is it? It says there was another deputy clerk with him, at first. A. Yes.

Q. That is what it says? A. The first part of it is stated there.

Q. You did so testify, didn't you, on the trial of these other defendants? A. I do not remember. I do not remember exactly. I may have.

Q. On your first visit into room 406 this morning when you saw this man, you now say that Miss Gray, another



clerk, went back with him? A. She came in to—she told me about it and I went back to get some files, and went with her and talked to him.

Q. She went back with you, didn't she? A. Yes.

Q. And you went into the room together? A. That is correct.

Q. The man was then standing and was waiting for you, for Miss Gray to bring you back? A. No, not that I know of.

Q. But when you came in he was not looking at the files, he was standing up looking out of the windows? A. Yes, 122 standing up looking at the files.

Q. He was looking at the files? A. Yes.

Q. I thought you said just a moment ago he was looking out of the window. A. I never mentioned a window.

Q. He was standing looking at the files? A. Yes.

Q. Did Miss Gray tell you she had given him the files to look at? A. No, I do not think she did. She told me he had asked to see the files; whether she gave them to him or not, I am not sure.

Q. She did tell you that he asked to see the files? A. Certainly.

Q. Had he asked in room 401, did Miss Gray tell you? 123 A. No, she did not tell me where.

Q. She did not say where? A. No.

Q. Is Miss Gray still alive? A. As far as I know.

Q. Does she still work at the courthouse? A. No, she does not.

Q. When did she leave the courthouse? A. The latter part of 1937 or the first part of 1938; I am not sure.

Q. Was that at about the time she married? A. Yes, she was there a while after she was married. She may have been married before this or after. I think she worked a while. I am not sure.

Q. How long were you in room 406 on this first visit?

A. Not over five minutes, if that long.

Q. Did you have any conversation with this man? A. I talked to him, yes.

Q. What was the substance of the conversation? A. Well, I told him we usually had people, attorneys, look at the files in a certain room, and I asked him if he wanted to see a certain paper, and he said no, he wanted to see the whole file, something to that effect.

Q. Did you ask him his name? A. I did not.

125 Q. Did you ask him where he lived? A. No.

Q. Did you remember the name of the file he told you he wanted to see? A. Yes, the deputy clerk told me that.

Q. But the man did not? A. No.

Q. He was a stranger to you? A. He was.

Q. Did you have any system there where they have to sign an application to see the files? A. We have not.

Q. You knew there were bonds in certain files there? A. I did not.

Q. You did not know it? A. No, I did not know it. I do not think I did, anyhow.

126 Q. Don't you know whether you knew it or not? A. I am not sure. I do not have charge of those files. I had the criminal files. Mr. Howard had charge of law and equity, anyhow. These were bankruptcy, too.

Q. That conversation that you have just related, you had that conversation with this man? A. Yes.

Q. Is that right? A. Yes.

Q. Lasting perhaps, a minute or so? A. No, I said five minutes or a little less. I was there that long, anyhow.

Q. You left the room? A. I got an armful of bankruptcy files and brought them into the other room.

Q. And you left the room? A. Yes.

Q. Did Miss Gray stay there at that time? A. I am not sure. I think she stayed a little while.

Q. When was the next time that you returned that day, if ever, to the room?

Mr. Reis: I object to the form of the question, when was the next time that he went in there.

The Court: Did you return to the room that day?

The Witness: I did.

Mr. Fennelly: This is cross examination. I assume I have the right to ask him if he ever went back.

Mr. Reis: What is the answer?

The Court: Yes, he said he returned.

The Witness: When?

Q. Yes. A. I do not know just exactly how soon after, but I think as soon as I went through this file and took out some claims and the duplicate and triplicate schedule in bankruptcy—I was cleaning them out to make more room for files.

Q. What I want to know is the time, Mr. Smith, when it was that you returned to this room, how long afterward. A. I could not say exactly. I might have been on something else, doing something else then, but if there was nothing that interfered, it would not have taken more than fifteen or twenty minutes.

Q. We do not want you to guess. It is pretty important. A. I do not know.

Q. Have you any recollection? A. This was five and one-half years ago.

Q. Of course, it was. Have you any recollection of when it was that you went back— A. Just as soon—

Q. —to this room? A. Just how soon after the first time I was in there, I do not know exactly.

Q. What time of the day was the first time you went in there? A. In the morning.

130

*Chell M. Smith—for Government—Cross*

Q. What hour? A. I would say ten o'clock or maybe a little before.

Q. What time does your office open? A. Nine o'clock.

Q. Who opens the room? A. The first deputy who gets there.

Q. Do you know who opened the rooms that morning? A. I certainly do not remember, no.

Q. On the second visit into room 406, how long did you stay there then? A. Until I got another armful of files and came back.

131

Q. Was that man still there? A. He was still there.

Q. Was Miss Gray still there? A. I do not think so.

Q. Have you any recollection? A. No.

Q. I believe you told us that you have a recollection. If you have, I would appreciate your telling us. A. I am not sure that she was there.

Q. Your best recollection is that she was not in there at the time of your second visit? A. That is correct.

Q. Did you have any conversation with the man that you saw there that time? A. No.

Q. How long did you stay in the room that time? A. Long enough to get another armful of files.

132

Q. Was he standing or sitting on your second visit to that room? A. I am not so sure. I remember him mostly when he was standing, with his overcoat on.

Q. On the occasion of the second visit was the man standing, or do you recall? A. I do not remember.

Q. Where were the file cabinets that you got your files from with relation to where he was? A. I was getting—in the center of the room, with two rows of filing cases back of each other, each filing case (indicating). He was on the right, and I was on the left (indicating). We kept them over here (indicating).

Q. So his back was toward you? A. No, his side.

Q. His side? A. Yes.

Q. When you went in on the second visit did he still have his overcoat on? A. It seems to me he did. It seems to me he had his overcoat on most of the time.

Q. Still had his hat on? A. I kind of think so. As I remember, he was with his hat on.

Q. Did you go back into the room again after that? A. Yes.

Q. When was the next time that you went into room 406? A. I do not remember exactly.

Q. Have you no recollection at all? A. No.

Q. Are you sure you came back into the room? A. Yes. 134

Q. You have some recollection of going back? A. Yes, I went often in there.

Q. When was the next time you went back that day, what time? A. I do not know the exact time.

Q. Before lunch? A. Yes.

Q. What time? A. I do not know exactly.

Q. What time did you go to lunch in 1937, in January, do you know? A. I think it was 12 o'clock.

Q. So the third visit you made that morning would be before 12 o'clock, is that right? A. It would.

Q. How long did you stay there that time, do you recall? A. I do not recall. 135

Q. Was the man still in the room? A. Yes, he was.

Q. Still had his overcoat and hat on? A. I think so.

Q. Was there any other clerk in the room at that time?

A. There may have been. They came in and out. I do not recall.

Q. Do you recall seeing any other clerk in there on the occasion of your third visit? A. I do not remember.

Q. Now then after lunch did you go back into that room, if you recall? A. I continued on with the same work, yes.

Q. When was the next time after lunch that you went into the room? A. It all depends on whether I finished the bunch which came in. I do not know exactly.



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*Chell M. Smith—for Government—Cross*

Q. You have no recollection of it? A. No.

Q. Do you have any recollection whether you went in at all after lunch? A. Yes, I went in in the afternoon.

Q. Once or more than once? A. Oh, several times.

Q. What do you mean by "several times"? Twice, three times, four times, five times? A. I would say three or four times.

Q. Was the man still in there every time you went in? A. He was until the last time. He was not in there then.

137 Q. The last time you went in he was not there? A. Yes, sir.

Q. On this afternoon occasion he still had his hat and coat on? A. I am not so sure he had. I do not remember.

Q. Have you any recollection? A. In the afternoon, no, I have not. I remember finding part of the files in the back, and some of them behind the radiator that afternoon.

Q. You do remember that? A. Yes.

Q. Did you find them? A. I found part of them.

Q. Didn't you immediately examine the files after you found part of them on the floor? A. I picked them up and put them in the file.

Q. That is all you did? A. Yes.

138 Q. You did not look through the files? A. For what?

Q. For anything, sir? A. No, I did not.

Q. Did you inquire of anybody else about these files being on the floor? A. I talked to the janitor about some mimeographing, mimeographed photostatic copies of checks that he found behind the radiator.

Q. Did you talk to the clerk of the court about it? A. No.

Q. Did you talk to Miss Gray? A. No.

Q. Did you talk to any other person? A. Not at the time.

Q. I mean at this time. A. No.

Q. Did you talk to any other deputies in the courthouse on that day about it? A. No.

Q. After you found some papers on the floor? A. For what?

Q. I say after you found these papers on the floor on that day did you talk to any other deputies in the courthouse about it? A. No, not that I remember.

Q. You have no recollection of that? A. No recollection.

Q. This man, you say, was a stranger? A. To me?

Q. Yes, to you. A. Yes.

Q. When Miss Gray told you that this man was in there, she told you there was a stranger there, didn't she? A. I do not remember her saying those words, no. She may have said there was a gentleman there. 140

Q. In substance? A. No, I do not remember her saying that.

Q. Didn't she tell you there was someone there that she did not know? A. She told me there was somebody she did not know.

Q. That, in substance, is a stranger. A. She said those words.

Q. Did she tell you that she did not know him? A. That is what she told me. 141

Q. At any time during the month of January, 1937, or the early part of February, 1937, did anybody connected with the clerk's office tell you that there was a stranger, other than this one occasion, looking at the files in your courthouse? A. Other than the one we are talking about?

Q. That is right, sir. A. No.

Q. So there was just this one occasion when you were told that some stranger was looking at files in the courthouse, is that right? A. That is right, that one day.

Q. Yes. A. That is correct.

Q. Now during your regular work you have occasion to go into this room 406 every day, don't you? A. No.

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*Chell M. Smith—for Government—Cross*

Q. Doesn't your work take you back and forth? A. It did at that time because I was doing that certain kind of work.

Q. I mean in January or February of 1937 you did have occasion to go back and forth every day into this office, didn't you? A. For a while, that is right.

Q. This is the only stranger that you remember in that room, is it, at that time? A. That is correct.

Q. During January or early February of 1937? A. That is right.

143

Q. Some time in April did you look through the files, the bankruptcy files, in connection with this Minnesota & Ontario Paper Company?

Mr. Reis: What year?

Q. Of 1937. A. April?

Q. April 1937. A. I say that, yes.

Q. Do you remember when it was? A. It was several months after February.

Q. Was it April or later than April? A. It was in April.

Q. When in April, do you recall that? A. I think around the 20th, but I am not sure.

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Q. You are not sure of that? A. No.

Q. Then you found those bonds were not there, is that right, the claims? A. Well, I thought you meant searched all the files for them, to look into the particular file. I do not remember ever doing it. I think Mr. Howard did.

Q. You have no recollection of ever looking at that particular file? A. I suppose I did, but I do not remember particularly when it was.

Q. Mr. Smith, please do not guess. If you have a recollection, give it to us, but please do not guess. Give us your best recollection, if you have one. If you haven't one, please tell us, frankly, that you haven't any recollection. Have you any recollection of going— A. I recollect.

Q. —into that room and looking through those files?

A. I remember I got, I think, a list of the claims from Mr. Howard and we checked over the files.

Q. That is not my question. Have you any present recollection of having looked through, specifically, these files of the Minnesota & Ontario Paper Company? A. I remember looking through the files and finding that list.

Q. Of the Minnesota & Ontario Paper Company files? A. The list of the claims, yes.

Q. Did you ever look for those claims or bonds that had been attached to them? A. I do not remember exactly. I cannot say that. I know I looked through many files trying to find them.

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Q. After these bonds or notes and claims were not found in April of 1937, did you make any written description of the man that you thought you saw there? A. I did not write any description. Mr. Howard, I think, did. We explained to Mr. Howard what he looked like.

Q. Did you put it in writing? A. I did not, no. Some of the other deputies did sign.

Q. Who are they? A. Miss Gray or Mrs. Tymeson.

Mr. Reis: Was Miss Gray known as Mrs. Tymeson?

147

The Witness: And Frances Baxter.

Q. They had seen this man, is that it? A. That is correct, at least they told me. Whether or not Miss Baxter saw him, I do not know. She told me that she did.

Q. She had said that she had seen him, is that right? A. That is right.

Q. Anyone else? A. No, I do not think there was anyone else.

Q. So there were those two who said they saw him and who gave some description of him, is that right? A. I

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*Chell M. Smith—for Government—Cross*

think they gave a description. I do not remember that. I know that I did, to Mr. Howard.

Q. Is it your best recollection that you gave Mr. Howard a description? A. I think so, yes.

Q. Did either of them tell you that they had given a description in writing? A. I do not know.

Q. Do you know whether or not they did? A. I do not.

Q. Did any investigator from any Federal office interview you at or about that time? A. I do not know when he came around, whether it was in April or later.

149

Q. You have no recollection? A. But he did at some time not far from that.

Q. What is your best recollection as to when you first talked to any investigating agency of the Federal Government either in or after April of 1937? A. I cannot say, and I do not want to guess. I do not know.

Q. You have no recollection when you first saw— A. No.

Q. Any Federal agent? A. That is right, but I do recollect seeing and talking to him, but when it was I do not know.

150

Q. Do you know the name of the Federal agent whom you first saw about this matter? A. I think it was Paulson.

Q. What? A. P-a-u-l-s-o-n.

Q. He was with what agency? From the Federal Bureau of Investigation? A. I think so.

Q. Mr. Smith, where was it that you saw Mr. Paulson of the F. B. I.? A. In our office.

Q. Did he take a question and answer statement with a stenographer? A. No, not that I remember of.

Q. You say you do not remember whether he did, or you do not remember him taking one? A. I do not remember him taking any.

Q. Your best recollection would be that he did not? A. That is correct.



Q. How long did you see Mr. Paulson on this occasion?

The Witness: On the occasion I had in mind I saw him quite a while.

Q. Half an hour? A. A couple of hours.

Q. A couple of hours. Was anyone else present? A. In the beginning, yes.

Q. Who else? A. I think Mr. Howard.

Q. And was Miss Gray there? A. She was in the office, but I do not remember whether or not she was present with Mr. Paulson. 152

Q. What was this other lady's name that you stated? A. Baxter.

Q. Florence Baxter? A. She was there in the office.

Q. Was she present at this meeting? A. I do not think so.

Q. By the way, what does Mr. Paulson look like? A. Well, he is a man 6 feet tall, or over; I think he has a bald head; weighs around 200 pounds, 196.

Q. Does he wear glasses? A. I do not think so.

Q. Did you ever see Mr. Paulson after that? A. Yes.

Q. When was the next time you saw Mr. Paulson? A. I do not remember exactly when it was. 153

Q. No recollection? A. No.

Q. Same year, 1937? A. Yes.

Q. You think it was? A. Yes.

Q. Where did you see him then? A. In the office.

Q. Did he take a question and answer statement before a stenographer about this matter? A. No.

Q. Did Mr. Paulson ever take a question and answer statement from you about this matter? A. Not from me, that I remember. I want to qualify that. He may have, but I do not remember.

154 *Chell M. Smith—for Government—Cross*

Q. Did you ever see Mr. Paulson again thereafter, after the second time? A. Yes, I have seen him.

Q. About this case? A. No, I do not think so.

Q. Just those two occasions? A. I may have seen him three times in Minneapolis.

Q. Pertaining to this case? A. Yes.

Q. That would be all, wouldn't it? A. I would not say. I may have seen him a year after or two years after. I do not remember.

155 Q. Can you tell me how many times you saw Mr. Paulson with reference to this matter? A. I could not say definitely.

Q. When was the last time that you saw him? A. In New York.

Q. When? A. You mean in regard to this case?

Q. Yes. A. I did not see him in regard to this case in New York.

Q. When was the last time that you saw him in regard to this case? Can you fix the time? A. No, I cannot.

Q. You have no recollection? A. No.

Q. Did you ever see any other Government agent about this case besides Mr. Paulson? A. No.

156 Q. He was the only Government agent that you ever saw about this case? A. I am sure that is right.

Q. He never took a question and answer statement before a stenographer about it from you? A. I am pretty sure—I am positive he did not take a statement before a stenographer.

Q. Did you testify before the Grand Jury? A. I did not.

Q. I think you have testified that the next time that you saw the man who looked like the man you saw in the courthouse in Minneapolis was in the courthouse in New York. I think you fixed the time around April or May of 1941, is that correct? A. That is correct.

Q. That was in a courtroom in this building? A. That is correct.

Q. You were accompanied by an F. B. I. agent on that occasion, weren't you? A. That is correct.

Q. You testified that you had only talked to F. B. I. Agent Paulson about this case. Didn't you talk to Mr. Milenky? A. After I was in New York, yes.

Q. Mr. Milenky is the gentleman sitting next to Mr. Reis? A. That is correct.

Q. And he was in the courtroom with you on this day that you think was in April or May. Do you remember which month it was in 1941, April or May? A. April, I think. I think it was April. 158

Q. Mr. Milenky was with you? A. With me?

Q. That is correct. A. That is correct.

Q. Mr. Milenky had told you, had he not, that the defendants named in this indictment were in court, were going to be in court? A. I think he said they were going to be in court for arraignment.

Q. That is why you were being brought here, is that right? A. That is correct.

Q. I think you have testified and said that when you were in New York in May or April, 1941, that you remember there that you saw a man sitting there who was the same man who was out in the courthouse in Minneapolis in this room, whom you saw in January or February 1st of 1937. 159

Mr. Reis: I object to the form of the question. He denies that it was February 1st. It is assuming a fact not in evidence, on cross-examination.

The Court: Yes. You went through that yesterday, about the dates.

Mr. Fennelly: I beg your pardon.

The Court: He did not say February 1st, did he?

Mr. Reis: He denied saying it.

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*Chell M. Smith—for Government—Cross*

Mr. Fennelly: Well, January.

The Court: January or February, as I recall.

Mr. Reis: The early part of February.

Q. Answer that. I modify the question, instead of February 1st. A. That is right.

Q. That was three and one-half years, approximately, after you had seen this man, then being in the courthouse in Minneapolis, when you saw him on this one day, is that right? A. I think it is four years, a few months over.

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Mr. Reis: What is that?

Q. I beg your pardon? A. A few months over.

Q. Over four years? A. Yes.

Q. You had never seen him in between those four years? A. That is correct.

Q. You had seen him in 1937 for the first time on one day, under the circumstances which you have described to this jury, is that right? A. That is correct.

Q. Now the man that you say that you saw in the courthouse in New York in April of 1941, or May, did he have glasses on? A. At that time?

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Q. Yes. A. Yes, he did.

Q. Did the man have glasses on that you saw out in Minneapolis? A. I do not remember.

Q. You have no recollection on that? A. No.

Q. And he was reading the files when you saw him, is that right? A. That is correct.

Q. Do you remember in the hall of one of the corridors of this building, and I think it was either in April or May of 1941, when Mr. Milenky brought you out and introduced you to Mr. Bollenbach? A. I do not remember that he introduced me.

Q. You do not remember him introducing you? A. No, sir.

Q. Don't you remember Mr. Milenky saying to you that "This is Mr. Bollenbach"? You do not remember you saying "Oh, I thought I knew you", and Mr. Bollenbach said, "I never saw you in my life before"? Do you remember that? A. That was never said.

Q. That was never said? A. No.

Mr. Reis: What was never said, Mr. Bollenbach's statement to you or your statement to Mr. Bollenbach?

The Court: The question contains several statements. Take them up separately.

Q. What was it that was never said?

Mr. Reis: May I ask that Mr. Fennelly ask whether there was a conversation and state the substance of it, and I think we would understand it.

Mr. Fennelly: I am cross examining the witness, if you do not mind.

The Court: Yes, it is cross-examination.

A. I know what was said. I know that you said was not what was said.

Q. Did you say "Oh! I thought I knew you, Mr. Bollenbach"? A. I did not. 165

Q. Do you recall his saying to you "I never saw you," meaning yourself, Mr. Smith, "in my life"? A. No.

Q. You do not recall that? A. No. I know he did not say it.

Q. You are sure of it? A. I am positive.

Q. Who else was present besides you, Mr. Milenky and Mr. Bollenbach on that occasion; if you recall? A. Oh, there were others going by.

Q. Was anyone standing present when this happened, to your recollection? A. I do not think there was anyone right present except Milenky and myself.



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*Chell M. Smith—for Government—Redirect*

Q. Do you recall? A. There were others going by.

Q. This is only April, 1941. That is not so long ago.

A. That is right.

Q. That is not as long ago as January of 1937.

The Court: You are quite correct.

Q. Can you recall whether or not someone else was present at the time that you met Mr. Bollenbach in the corridor with Mr. Milenky? A. There were a lot of them present, coming out—

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The Court: He is talking about the immediate group that was talking.

The Witness: All I can recollect is we three.

*Redirect examination by Mr. Reis:*

Q. Mr. Smith, what did you say to Bollenbach and what did he say to you?

Mr. Fennelly: When?

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Q. At that conversation in the courthouse that Mr. Fennelly questioned you about, either April or May of 1941.

A. I went up to him and I asked him if he had ever been in Minneapolis. He said "No, I never was in Minneapolis in my life."

Q. The man that you saw in the clerk's office at the time you noticed someone going through the bankruptcy files, did that party at any time take his hat off? A. I do not recollect him with his hat off.

Q. Do you remember testifying in this court in 1941?

A. Yes.

Q. Do you remember Bollenbach being there in the courtroom?

Mr Fennelly: Just a minute. I object to that.

The Court: Overruled.  
Mr. Fennelly: Exception.

Q. Do you? A. I do.

Q. Do you remember Bollenbach taking his glasses off when he was brought in the courtroom?

Mr. Fennelly: I object.  
The Court: Overruled.  
Mr. Fennelly: Exception.

A. I did not see him take them off. He did not have them on when he came in the courtroom. 170

Q. Is that correct? A. Yes.

Q. As a matter of fact in April or May of 1941 you came to this building pursuant to a subpoena issued by the United States Attorney's office, didn't you? A. Yes.

Q. You came to see me? A. Yes.

Q. You did not come to see Mr. Milenky, did you? A. No.

Q. At the time you saw me and Mr. Milenky, was Mr. Keating with me in the room? A. Yes.

Q. Did Paulson show you any pictures at the time he interviewed you? A. He showed me a series, yes. 171

Q. Were you able to identify anyone that Paulson showed you? A. No.

Q. Did Milenky or Keating show you any pictures when you came to New York in April or May, 1941?

Mr. Fennelly: I object to it.  
The Court: Overruled.  
Mr. Fennelly: Exception.

A. Keating did—

The Court: Just a moment.

Mr. Fennelly: It is not proper redirect. I have not examined him on the question of what they did.

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*Chell M. Smith—for Government—Recross*

The Court: Overruled.

Mr. Fennelly: Exception.

Q. Did Mr. Keating or Mr. Milenky show you any pictures? A. I remember Mr. Keating showing me, that is, if he is the gentleman that associates with Mr. Milenky.

Q. Do you remember either man having glasses on?

A. That is right.

Q. Will you state what Keating looks like?

173

Mr. Fennelly: I object to this, your Honor.

The Court: Yes.

Q. Did Keating show you any pictures? A. He did.

Q. How many would you say he showed you? A. Oh, five or six at first. I saw some after.

Q. Did he show them to you one at a time? A. One at a time.

Q. And then did he put them on the table, a group of pictures on the table?

Mr. Fennelly: I object to it.

The Court: Yes, I will sustain the objection.

174

Mr. Reis: All right, Judge.

Mr. Fennelly: I move to strike out his testimony as to what happened here.

The Court: Yes, I think so. About these photographs, I will strike that out.

Q. Is that the man that you saw in the clerk's office in Minneapolis in January or early February 1937? A. I feel quite certain he is the man.

*Recross examination by Mr. Fennelly:*

Q. Did you ever make a mistake in your life? A. Yes, many.

Q. You have made a mistake identifying people or seeing them when you passed on the street and sometimes it is somebody that you know? A. Yes, I have done that.

Q. It is possible that you could make a mistake? A. I have mistaken twins, too.

Q. It is possible that you could be mistaken? A. Oh, yes, it could be, but I do not think so.

The Court: All right.

*Redirect examination by Mr. Reis:*

176

Q. Mr. Smith, do many strangers come out to the clerk's office in Minneapolis? A. As a rule not.

Q. In other words, you know the attorneys of that community? A. Yes.

Q. When a stranger approaches you, you know that he is a stranger? A. Yes, somebody different, if it is somebody different.

Q. When Mr. Fennelly asked you if you could be mistaken about this man, you answered that you could be. A. Oh, sure.

Q. Do you feel that you are mistaken about your identification of this defendant? A. I do not feel that way.

177

Mr. Reis: That is all.

Mr. Reis: May I call Mr. Howard for just one question, Judge?

The Court: Yes.

178 *Thomas H. Howard (Recalled)—for Government—Direct  
—Cross—Redirect*

THOMAS H. HOWARD, recalled, testified further as follows:

*Direct examination by Mr. Reis:*

Q. Did you make a report to any governmental agency as to the list of these gold bonds that were taken from the files? A. I made a full report to my superior officer on May 7, 1937.

Q. Who was that, sir? A. The clerk of the court.

179 Q. That was May 7? A. May 7, to the best of my recollection. I can make that positive, if you wish.

Q. Thereafter was there any agent from any Federal bureau questioning you about the reports that you made to your superior? A. Yes, after that I was interviewed by an F. B. I. agent.

Mr. Reis: That is all.

*Cross examination by Mr. Fennelly:*

Q. Is Miss Baxter still employed at the courthouse?  
A. She is.

180 Q. Is Miss Gray still living? A. As far as I know.

Mr. Fennelly: Thank you, sir.

*Redirect examination by Mr. Reis:*

Q. Where is she? A. I think in California.

Q. You do not know where, do you? A. No.

Q. You would not know where to locate her, would you?  
A. No, not positively.

*By Mr. Fennelly:*

Q. You have not made any effort to locate her? A. I would have no occasion to.

Mr. Reis: That is all.



*Julia Agnes Bauer—for Government—Direct*

181

JULIA AGNES BAUER, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Miss Bauer, by whom are you employed? A. Peter W. Burns.

Q. What is the name of the business? A. Bond & Share List Company.

Q. How long have you been employed by Mr. Burns? A. A little over six years.

Q. I show you this photograph. Is that Mr. Burns? A. It is.

182

Mr. Reis: I offer it in evidence (handing to Mr. Fennelly).

Mr. Fennelly: No objection.

(Marked Government's Exhibit 5.)

Q. Do you know Chester Bollenbach? A. I do.

Q. How long have you known him? A. As long as I know Mr. Burns.

The Court: How long is that?

The Witness: Ever since the time I worked there.

The Court: When was that? We do not know that.

183

The Witness: Six and one-half years ago.

The Court: Thank you.

Q. That would be around 1935? A. I think so.

Q. Did Mr. Burns leave the office for a period of time?

A. He did. He always does.

Q. For how long a period at a time? A. Over two weeks.

Mr. Fennelly: Will you fix the time?

184

*Julia Agnes Bauer—for Government—Direct*

Q. Going back to 1935, 1936 and 1937. A. He was away, I think, five months.

The Court: Who are you talking about?

The Witness: Mr. Burnas.

Q. When was this? A. About five years ago.

Q. Would you say about the latter part of 1936 and the early part of 1937? A. Around that time, yes.

Q. Did Mr. Bollenbach share space with Mr. Burns?

185

A. Yes, he did.

Q. What period of time? A. Well, from the first time I came down to work, which was six and one-half years ago until the present time.

Q. Does Mr. Bollenbach still share the space—

Mr. Fennelly: I object to the form of the question, "share space."

The Court: Tell us what he does.

Q. What does Bollenbach do in your place of business?

A. All he does is to receive—

186

The Court: What place?

The Witness: 15 William Street, Room 1200.

Q. What is the name of the office? A. Bond & Share List Company.

Q. Do you say that Mr. Bollenbach would come into the place of business every day to get his mail? A. Yes.

Mr. Fennelly: May we have the time fixed?

The Court: Yes.

Q. 1937 and 1938? A. Yes.

Q. Was there a period of time during 1936 or 1937 and 1935, also, that Mr. Bollenbach did not appear in the office for two or three weeks at a time? A. No.

Q. Are you sure about that? A. I am.

Q. Do you remember testifying in this case, in this courtroom, last December? A. I do.

The Court: In this courtroom?

Mr. Reis: Not this courtroom. This court building.

The Court: All right.

Q. Last December, do you? A. Yes, sir.

Q. Do you remember the following question:

"Q. You say you saw Mr. Bollenbach once or twice a week? A. Then again sometimes not for a week or two?"

A. Well, no—

The Court: What do you mean by "Well, no"?

The Witness: Well, he comes in twice a week, at least.

The Court: He asked you if you said that under oath.

The Witness: I guess I did, as long as it is there.

Mr. Fennelly: Object to the form of the question, because there is no conflict.

The Court: Yes, there is a conflict.

Mr. Fennelly: I am sorry.

The Court: She said he came in once or twice a week.

Mr. Fennelly: I do not believe that what she said is in conflict with this testimony, as I read it.

The Court: Put the question.

Q. "Q. 1936 and 1937, how often would you say you saw Bollenbach in your place of business? A. At least once a week, twice a week."

I assume you made that answer? A. Yes, I did.

Q. Do you recall this question:

190

*Julia Agnes Bauer—for Government—Direct.*

“Q. You say you saw Mr. Bollenbach once or twice a week? A. Then again sometimes not for a week or two.”

Did you make that answer? A. Yes.

Q. “Q. He would stay away from the office a week or two at a time? A. Yes, sir.”

Did you answer that way at the trial? A. Yes.

Q. The last trial you testified, is that correct? A. Yes.

Q. You were sitting in the witness room, weren't you, yesterday? A. Yes.

191 Q. Do you remember telling some of the witnesses that you could not understand why you had to testify in this case, that you could not remember anything that took place five years ago? A. Yes.

Q. You did? A. Yes.

Q. You tried to influence some witnesses, didn't you?

A. No, I did not try to influence—

Mr. Fennelly: I object.

The Court: Overruled.

Mr. Fennelly: I move for a mistrial.

A. (Continuing) It was not true.

192

Mr. Fennelly: I move for the withdrawal of a juror and a mistrial as to the conduct of the District Attorney in questioning the witness.

The Court: Overruled. Nothing improper about talking about the conduct of the District Attorney.

Mr. Fennelly: I take an exception to your Honor's remark.

Q. What did you do with the bank account? A. I would just make deposits.

Q. What bank did Mr. Burns have an account in? A. The Corn Exchange Trust Company.

Q. What branch? A. William Street.

*Julia Agnes Bauer—for Government—Direct*

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Q. 15 or 18 William Street? A. Yes.

Q. What was the average deposit in that period of time, take February of 1937? A. I do not remember.

Q. Do you remember my questioning in the trial in December of 1941?

Mr. Fennelly: I object to it.

A. Yes.

Mr. Fennelly: As immaterial and irrelevant.

Mr. Reis: I will connect it up.

194

The Court: I will take it subject to a motion to strike.

Q. "Q. What is the average deposit? A. Well, it would vary. One day he would get maybe fifty or sixty dollars and maybe next day nothing."

Do you remember making that answer to that question? That is what I am trying to find out.

"Q. Take one in January. A. I do not remember, but I would assume about \$40."

Do you remember making that answer? A. Yes, but, Mr. Reis, I would like to say that there were times when Mr. Burns would make a sale for \$100 and maybe the next day for \$200. I would put that deposit down. And then he would not get any more. I do not know how you could get the average.

195

Q. Would you say that the average would be about \$200?

Mr. Fennelly: I submit that the best evidence would be to subpoena Mr. Burns and find out what the balance is.

Q. Would you say that the average would be about two hundred to \$240 at the time in January 1941?

Mr. Fennelly: I object.



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*Julia Agnes Bauer—for Government—Direct*

A. I do not remember.

Mr. Fennelly: If they want the testimony, the best testimony is the account itself.

The Court: Have you the account?

Mr. Fennelly: I will have the account.

Mr. Reis: But there is a reason why I am asking these questions. I will connect it.

The Court: I will take it subject to a motion to strike.

Mr. Fennelly: I except.

197

Q. Do you? A. Will you please read the question?

Q. Would you say that the average would be about \$200 to \$240 a week at that time in January, 1937? A. I cannot say.

Q. "A. I think it would be less than that." Do you remember making that answer? A. I do not remember, but I suppose I did.

Q. Did you make a deposit on or about February 14, 1937 of \$1,200 in the account of Peter Burns?

Mr. Fennelly: I object.

198

A. I do not remember.

Mr. Fennelly: Just a minute. I object to it as immaterial and irrelevant.

The Court: Overruled.

Mr. Fennelly: I do not see under any theory how it would come in. The bonds were in New York in early January. This is after the event. They were at rest, no participation. The interstate commerce had finished.

The Court: I will take it subject to a motion to strike.

Mr. Reis: Will you read the question, please?

Q. (Read.)

The Court: What year?

Mr. Reis: February 14, 1937 or February 15, 1937.

A. I do not remember making the deposit.

Q. Did you sign any checks on behalf of the Bond & Share List Company in 1937? A. Yes.

Q. January or February? A. Yes.

Q. You kept the check book? A. Yes.

Q. And you kept the deposits on the stub of the check book, did you? A. Yes. 200

Q. Have you got the check book for that period? A. I do not know whether I have them now or not.

Q. You did have charge of Mr. Burns' books at the time? A. Yes.

The Court: Do you remember this \$1,200 deposit, if there was one, indicating a \$1,200 deposit?

The Witness: Not right now.

Q. Do you know anything about the \$1,200 cash deposit made by Peter Burns on or about February 14 or 15, 1937? 201

Mr. Fennelly: I object to it. The witness has already answered.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. Do you? A. The first time I would recall anything was at the time of the last trial, last December.

Q. That was the first time you knew about it, is that right? A. I think so.

Mr. Reis: That is all.

202

*Julia Agnes Bauer—for Government—Cross**Cross examination by Mr. Fennelly:*

Q. I show you Defendant's Exhibit B for Identification. Tell me who that is. A. That is my employer, Mr. Burns.

Q. Mr. Burns, he is the same man as shown in the Government's picture, Government's Exhibit 5, is that right?

A. That is right.

Mr. Fennelly: I offer Exhibit B for Identification in Evidence (handing to Mr. Reis).

203

Mr. Reis: I think it was marked for identification at the time Mr. Smith testified.

The Court: It will be marked. Mr. Chell Smith said he never saw him.

(Defendant's Exhibit B for Identification received in Evidence.)

Q. You are not employed by Mr. Bollenbach, are you? A. No.

Q. Never have been? A. No.

Q. Isn't it a fact that Mr. Bollenbach's only connection with that office, was that he received mail there as a mailing address?

204

Mr. Reis: I object to the form of the question.

Mr. Fennelly: It is cross-examination.

Mr. Reis: The witness can testify what he does. What did he do?

The Court: I will let her state what he does there.

Mr. Fennelly: Am I permitted to ask the question?

The Court: No. I sustain the objection. She may state what she observed the defendant do.

Mr. Fennelly: I respectfully except.

The Court: It is for the jury to determine the conclusion.

Mr. Fennelly: I respectfully excep.

Q. Did Mr. Bollenbach receive mail at that office? A. Yes.

Q. And he used that office as a mailing address, is that correct? A. Yes.

Q. During 1937, in January, do you recall whether or not Mr. Bollenbach called at your office?

Mr. Reis: What year?

Mr. Fennelly: 1937. I said in January.

A. Yes, he called at the office.

Q. How often would you say he called at the office during that month? A. I should judge at least twice a week.

Q. How long would Mr. Bollenbach stay when he called?

A. Only to get his mail.

Q. And then leave? A. And leave.

Q. On the days in January of 1937 when Mr. Bollenbach did not come into your office, did he telephone you on other days? A. Yes, he would call up, if he did not come in.

Q. Do you have any recollection of Mr. Bollenbach ever calling you from any out-of-town place in either January or February 1937? A. No.

Q. When he telephoned you they were local calls, so far as you know? A. Yes.

Q. At that same time was Mr. Burns, your employer, was he in or out of the office? A. He was out of town at the time.

Q. Was he in the office at all at any time in January 1937? A. Mr. Burns?

Q. Yes, Mr. Burns. A. No, he was out of town.

208

*Julia Agnes Bauer—for Government—Cross*

Q. At that time how long had he been out of town, do you recall? A. I guess four and one-half months or five months.

Q. Do you know any place that he visited? A. Various points.

Mr. Reis: I object to that.

The Court: Obviously it would be hearsay unless you were there.

The Witness: Yes.

209

Q. Did he telephone during January of 1937 and say where he was? A. Oh, yes.

Q. Where did he tell you he was? A. He was in Chicago.

Q. Any place else? A. I think Milwaukee. He was in so many places I do not recall all of them.

Q. Have you been interviewed by Mr. Milenky, sitting next to Mr. Reis? A. Yes, I was.

Q. When were you first interviewed by him, do you recall? A. When Mr. Burns and Mr. Bollenbach were indicted.

210

Q. Do you recall when that was, about? A. I do not.

Q. Was that back around 1939, November? A. Yes, I guess it was.

Q. How many times were you interviewed by Mr. Milenky? A. Many times.

Q. Did he ever threaten you?

Mr. Reis: I object to it.

The Court: Sustained. She can state what occurred.

Q. Will you tell us what occurred?

Mr. Reis: When and the place, please.

The Court: When?



Q. In interviews with Mr. Milenky, what did he state to you? A. I do not recall. Over a year ago Mr. Milenky was very rash and he said what I needed was a night in jail, or to that effect, to freshen my memory.

Q. Was there any other occasion when Mr. Milenky made similar or other remarks to you? A. No.

Q. As far as you know was Mr. Bollenbach ever out of New York? When I say "New York" I mean out of the immediate vicinity, Brooklyn and Jersey City, in January of 1937? A. No.

Mr. Reis: If she knows of her own knowledge. 212

The Court: Yes, of course, it would be to her own knowledge.

The Witness: No.

Mr. Reis: I did not get the answer.

The Witness: I said no. I do not recall his being any place but in the immediate vicinity of New York.

Q. In 1937, January, Mr. Bollenbach had his office in Jersey City, did he not? A. What time was that?

Mr. Reis: I object unless she knows.

Q. Do you know whether or not Mr. Bollenbach had his office in Jersey City? A. Was that five years ago or so? 213

Q. Let's start today. Do you know whether he has one there today? A. No, I do not know whether he has an office there now or not.

Q. Do you know whether or not there was a time when he did have an office? A. Not that I was sure of.

Q. You do not know anything about it, is that it? A. No.

Q. When you first went to work at the office in your present employment, who was your employer then? A. Mr. Burns.

Q. Who was it who then rented space from the building, do you recall? A. Who rented the space?

Q. Yes. A. No, I do not know.

Q. There was, someone else there before Mr. Burns?

A. Oh, yes.

Q. I mean at the time you first went to work there wasn't there somebody there besides Mr. Burns who had an office there? A. Yes, there was, but that was before I came in.

Q. At the time you came in was there someone— A.

215 Yes, as I understand.

The Court: Not as you understand. He asked when you were there, about something that happened before you went there. That is your question?

Mr. Fennelly: Yes, your Honor.

Q. Do you recall whether or not there was someone when you first went there who had the office? A. Yes. I could explain in my own words.

The Court: No. He wants to know when you were there was there anybody else there, while you were employed there.

216

The Witness: Yes, there were a lot of people there.

The Court: Did anybody have an office there while you were there?

The Witness: It was just that one office. I cannot understand.

Q. Was there someone there other than Mr. Burns when you first went there, who rented that office from the building? Mr. Burns rented space from this man who had the office? Was that so when you first went there? A. Well, I did not know that at the time, but as months

went by I would see different ones there while I worked there. Mr. Burns explained that there was another man—

Mr. Reis: I object.

The Court: You were not asked that.

The Witness: I do not know how to explain myself then.

Q. Now in 1935, 1936 and 1937 there were other people who had space there, were there not? A. Yes.

Q. Can you tell me about how many? A. I would say three or four different people that were there.

Q. Were there other people, in addition to receiving mail there? A. Yes.

Q. Could you say about how many of those there were? A. Yes, about three different people.

Q. Do you know Mr. James P. Howe? A. Yes, I do.

Q. When did you first meet him? A. I would say two years ago, at the office.

Q. Did he have space in your office at any time, do you know? A. Not while I was there, but previous—

The Court: Only tell what you know, not what you have been told.

The Witness: All right, I am doing that.

The Court: When you say "previous", you do not know anything about it; it is something somebody told you?

The Witness: Mr. Howe himself was there.

The Court: She does not understand the rules of evidence. Go ahead. Anything more with this witness?

Mr. Reis: One question.

*Redirect examination by Mr. Reis:*

Q. Did you get word from Minneapolis from Burns while he was on that trip? A. Yes.

220

*Julia Agnes Bauer—for Government—Recross*

Q. You were in this court with Peter Burns yesterday afternoon, were you not? A. Yes.

Q. You talked with Mr. Burns and with Mr. Bollenbach, is that correct? A. Yes.

Mr. Reis: That is all.

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AFTERNOON SESSION

221

JULIA AGNES BAUER, resumed the stand.

*Recross examination by Mr. Fennelly:*

Q. Miss Bauer, just before recess I was asking you what time it was. Do you recall that you said that Mr. Burns telephoned you from Minneapolis? You did testify, as I understand it, just before we left for luncheon, that Mr. Burns had telephoned you from Minneapolis? A. Yes.

Q. I do not think you fixed the time. Will you, please? A. I do not think I can fix the time. I am not sure, it is so long ago.

222

Q. Was it in January of 1937? A. It could be.

The Court: Not what it could be. Was it?

The Witness: I do not remember.

Q. Have you any recollection about when it was? A. No.

Q. Was it during the time that he was on this trip? A. Oh, yes.

Q. When he was away, as you said, for several months? A. Yes.

Q. It was during that time? A. Yes.

*Redirect examination by Mr. Reis:*

Q. Let's see if I can refresh your recollection as to your testimony about the telephone call from Minneapolis:

"Q. Coming to the one of 1936, that is the one of January, 1937, do you recall Mr. Burns being away on an extended trip? A. Yes, sir.

"Q. How long was he away from the office?"

Mr. Fennelly: I object to this. I think we have gone into it.

Mr. Reis: I am going to trace the different calls from Minneapolis.

The Court: He may continue.

Q. (Continuing) "A. I imagine about a month.

"Q. Did you receive various phone calls? A. Yes, sir, from where he was.

"Q. From where? A. Chicago.

"Q. Where else? A. Detroit—I am just telling you what he told me about the cities.

"Q. That is, on the telephone? A. Yes, sir.

"Q. You say you got a call from Minneapolis or more than one during that period of time? A. Yes, sir.

"Q. That is January 1937. Now what was your telephone number then? A. I don't remember, it was changed since then."

Does that refresh your recollection that you did receive other calls from Mr. Burns from Minneapolis? A. Yes.

Q. At the same time in January, 1937? A. Yes.

Q. Does it? A. It does.

Mr. Reis: That is all.



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*Julia Agnes Bauer—for Government—Recross  
—Redirect*

*Recross examination by Mr. Fennelly:*

Q. It was during January of 1937, I believe you testified, that Mr. Bollenbach was in New York and came into your office several times a week, is that right? A. Yes.

Q. And that on the days that he did not come in he telephoned to you and to your knowledge that he was out of town once, is that right? A. That is right.

227

*Redirect examination by Mr. Reis:*

Q. You did testify that Bollenbach was out of town for a week or two at a time, didn't you?

Mr. Fennelly: During what period of time?

Mr. Reis: During that period of time.

Mr. Fennelly: What period of time?

Mr. Reis: I will read it again.

Q. During that period in January of 1937? A. January of 1937.

228

Mr. Fennelly: May I ask the witness a question to embrace the time before he starts his examination?

Q. In 1936 and 1937 was Bollenbach in the office every day? A. I do not remember every day, but I know he telephoned whenever he did not come in.

Q. Was he away for a week or two at a time during that period of time?

Mr. Fennelly: What period of time?

Mr. Reis: During 1936 and 1937. During the years 1936 and 1937.

Mr. Fennelly: That covers a period of two years.

Mr. Reis: That is right. I will simmer it down.

The Witness: I do not recall his being away a week or two at a time, at that period.

The Court: What period are you talking about?

The Witness: 1936 and 1937.

Q. "Q. How long did you note Bollenbach's absence, when you came to work for Mr. Burns?"

Mr. Fennelly: I object to the form of the question.

The Court: Were those questions put to you and did you make those answers?

230

Q. "Q. How long do you know Mr. Bollenbach? A. Ever since I came to work for Mr. Burns, some time in 1937."

Mr. Fennelly: Objected to.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. "Q. Do you recall what months? A. December."

Mr. Fennelly: I object to this. The witness has so testified.

231

The Court: Same ruling.

Mr. Fennelly: It is giving the impression to the jury that the witness is testifying to the contrary. The witness has stated exactly what he is now reading to her.

The Court: You may proceed.

Mr. Fennelly: Exception.

Q. "Q. You met Mr. Bollenbach at the premises, 15 William Street? A. Yes, sir."

"Q. Were you introduced to him?"

232

*Julia Agnes Bauer—for Government—Redirect*

The Court: Let's get down to the time of the alleged occurrence.

Mr. Reis: I am coming to December 1936.

Q. (Continuing) "Q. You say you saw Mr. Bollenbach once or twice a week? A. Then again sometimes not for a week or two."

Did you make that answer? A. If it is in the book, I made the answer.

Q. "Q. He would be away from the office"—

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Mr. Fennelly: That testimony does not relate to the month of January 1937.

The Court: The years of 1936 and 1937. It might include January—

Mr. Fennelly: It may have been the first week of January 1936.

The Court: That is all right.

Q. "Q. He would be away from the office a week or two at a time? A. Yes, sir."

Do you remember making those answers to those questions? A. I do not remember making it, but if it is there—

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Q. Then you did make it if it is there? A. Yes.

Q. You wish to change your testimony? Did you see Mr. Burns every day during January 1937? A. No, Mr. Burns was out of town.

Q. I mean Mr. Bollenbach. A. I did not ask what he went for.

Q. Did you see him every day in the month of January 1937? A. No.

Q. As a matter of fact he was away for a week or two at a time during that period of time? A. Ever since I have known him.

The Court: I did not hear that.

(Record read.)

Q. January 1937. A. I do not recall, Mr. Reis.

Q. But you would not say he was not there every day during that period of time? A. No.

Mr. Reis: That is all.

*Recross examination by Mr. Fennelly:*

Q. Didn't you say he was in there a few times during the month of January 1937? A. Yes.

Q. And that he was in and out of town during that period? A. Yes, because he would telephone to me almost every day he was away, every day that he did not come in.

Q. He came in, you said, two or three times a week, is that correct? A. Yes.

*By Mr. Reis:*

Q. You do not know where he telephoned from, do you?  
A. No, I do not.

Mr. Reis: That is all.

*By Mr. Fennelly:*

Q. You never heard the operator say "This is a long distance call, Washington calling you" during that month of January 1937 when Mr. Bollenbach called you? A. No.

Q. You never had the long distance operator call you, you say? A. No.

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*Herbert Hipkins—for Government—Direct.*

HERBERT HIPKINS, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Hipkins, what is your occupation? A. I am a bond and stock trader.

Q. By whom are you employed now? A. Goodbody & Company.

239 Q. In February 1937 whom were you employed by? A. Hart Smith & Company.

Q. Where were they located? A. 52 William Street.

Q. How long were you working with them? A. About seven years.

Q. How long ago did you leave their employ? A. Two months ago.

Q. What were your duties at Hart Smith & Company? A. Trading in bonds and stocks.

Q. Did Hart Smith specialize in any type of securities? A. Yes, they did.

Q. What? A. Paper securities.

240 Q. What do you mean by "paper"? A. That is, securities dealing with pulp paper, paper products; Canadian securities.

Q. Was it an over-the-counter house? A. Yes.

Q. Not a member of the Stock Exchange? A. That is right, they were not.

Q. Do you recall a deal involving 10 Minnesota & Ontario Paper Company gold notes? A. I do.

Q. Did you make a trade on behalf of a person named Berendson? A. I did.

Q. Do you recall when? A. In the early part of February 1937.

Q. Will you tell his Honor and the jury the facts pertaining to that trade, to the best of your recollection?



A. I will. I received a telephone call from a gentleman who gave his name as Arnold Berendson.

Q. Can you place the time? A. Possibly January 31 or February 1 of 1937. He asked me for the quotation on those Minnesota & Ontario Paper gold notes.

Mr. Fennelly: I object as incompetent.

The Court: I will take it subject to a motion to strike.

Mr. Fennelly: Exception.

Q. Go ahead. A. And he asked me for the market on the aforesaid Minnesota & Ontario gold notes, which I gave him at that time. I did not hear anything from him again until possibly the next day, when he asked me a similar question. Then he began to tell me a bit more; that he was interested in liquidating possibly \$25,000 worth, and what my knowledge was concerning the market and whether the market would be able to absorb that quantity. I believe at that time I assured him that we could dispose of \$10,000 the first day and possibly the balance within a day or so.

242

I received another call about the third day and we then consummated our first transaction. I gave him the market, the bid and asked prices, and he sold me \$10,000.

243

Q. What was your conversation with him? Did you ask him who he was? A. I did.

Q. Let's go into that, please. I ask you to tell me everything that happened. A. I asked him that inasmuch as we are not in the habit of dealing with individuals—

Mr. Fennelly: My objection goes to this, and the same ruling?

The Court: Yes.

Mr. Fennelly: Exception.

241

*Herbert Hipkins—for Government—Direct*

A. (Continuing) I asked him inasmuch as we were not in the habit of dealing with individuals, who he was, and whether he could produce any references, because I had never heard and did not know the name of Arnold Berendson.

245

He said he could furnish such references, and he said he came from the west, Minneapolis. I had asked him if he did not have any acquaintances in the east, and that accounted for the fact that he did not know anybody. So that having assured me that he would meet the requirements, that the requirements would be met, he continued to talk and negotiated the bonds with me. That brings me back to the other—

Q. Go ahead. A. I said, "We are not in the habit of accepting or having a transaction with an individual and therefore he would have to give us a bank reference or a Stock Exchange reference in the east."

He said he would give us such a bank reference. So that I subsequently purchased \$10,000 worth of those bonds from him.

246

The Court: Did you see him?

The Witness: No.

The Court: That is what he told you?

The Witness: That is what he told me. That was the conversation over the telephone.

Q. By way of a conversation? A. It was done on the telephone. I had never seen the gentleman.

Q. Did you tell him that if he had no brokerage account to deal through, a firm, he would have to deal through a bank?

Mr. Fennelly: Do not lead him.

The Court: Were you told that?

The Witness: This is in 1937.

Q. You want your recollection refreshed? Have you exhausted your memory? Do you want to have it refreshed? A. You just asked me a question about something that I think you will find in the testimony there, that I did ask him for a Stock Exchange or a bank reference. Wasn't that the question?

Q. Did he say to you that he would send a bank—

Mr. Fennelly: I object.

The Court: Do you recall anything else that was said?

The Witness: Yes, I do, your Honor.

248

The Court: Tell us what was said. Exhaust his recollection, first, before you read him anything.

The Witness: I recall that he said the bank would deliver the securities for him.

Q. Pursuant to that conversation—

The Court: Anything else now that you recall?

The Witness: No, I do not.

The Court: All right.

Q. Pursuant to that conversation did you quote him the market price on the bonds? A. I did.

249

Q. What was the market price you quoted him? A. I believe it was 25, 26.

Q. That is, \$250 a bond? A. Correct.

Q. Did you receive those gold notes? A. The gold notes were delivered by a person to my office in an envelope, and that envelope was handed to me.

Q. I show you this envelope. Is that the envelope that was handed to you? A. It is.

Q. With the gold notes in it? A. That is correct.

Q. Have you an independent recollection of the numbers of those gold notes? A. No, I have not.

250

*Herbert Hipkins—for Government—Direct*

Q. Can you refresh your recollection from the blotter?

A. I would have to do that.

Mr. Fennelly: May we have the envelope he identified marked?

Mr. Reis: Mark it in evidence (handing to Mr. Fennelly).

Mr. Fennelly: No objection.

(Marked Government's Exhibit 6.)

251

Q. Look at this blotter—

Mr. Fennelly: I reserve my motion to strike out. I said, "no objection."

The Court: Yes.

Q: See if you can tell me what the serial numbers of the gold notes were. A. 3308 through 3317.

Q. After those gold notes were delivered to you, what happened? A. I turned the envelope over to our cashier and told him to issue a check. That is, we were quite busy during that period of time, and I did not do anything more about it. That was the end of it.

252

Q. Was that on February 3? Look at the date on the check. Would that refresh your recollection (handing to witness)? A. Yes, that occurred on February 3, 1937.

Q. What happened after you received the gold notes and made the trade?

The Court: What about the check? Mark it in some way.

Mr. Reis: I will mark it for identification right now.

(Marked Government's Exhibit 7 for Identification.)

Q. What happened after you made the trade and asked the cashier to issue a check? A. The next thing that I recall that occurred was that the letter we sent with the confirmation transaction was returned to us "Addressee Unknown."

Q. Where did you send the confirmation of sale? Do you recall? A. No.

Q. Would the address on the envelope refresh your recollection? A. Yes.

The Court: What is it?

Mr. Reis: That is East 40th Street.

254

Q. You say you received back your confirmation envelope with the notation "Addressee Unknown"? A. That is right.

Q. In between that time—

Mr. Fennelly: May we have that letter? I do not want to object to it.

Mr. Reis: I haven't got the letter.

Q. Have you got the letter? A. No.

Q. Did you search for it when I asked for it about a year ago? A. My superior officer did, yes.

255

Q. After you received the envelope returned "Addressee Unknown", had this Berendson talked to you on the telephone? A. He did. He had called me approximately once a day, and I told him that the letter had been returned, and then he gave me another address.

Q. Do you recall what address that was? A. No, I do not. I think it was just a slight difference in the number.

Q. Was it 15? A. Either 10 to 15, whatever that was.

Q. It says 10. A. Then it was 15 East 40th.

Q. Did he tell you what office space it was? A. No, he did not.



Q. After you received that communication, what did you do? A. I called the telephone company information, and they told me it was an office building, and the room number, and they gave me the telephone number applicable to that room number.

Q. Who did they tell you the room number belonged to? A. I am a little bit obscure on that. I do not know whether they told me who it was.

Q. Would the name Tryon mean anything to you? A. The party who answered the phone told me the name was  
257 Tryon.

Q. What happened after that? A. Then we called up Minneapolis, called some of the references which Mr. Berendson had given. Amongst them, if I recall, was the Pillsbury Flour Company. We called them up and they said they did not know any such person.

Q. Through the teletype? A. Yes.

Q. Was that a conversation by Mr. Hart Smith himself? A. Yes.

Q. What happened after that? A. Then subsequently we telephoned and called Mr. Berendson. We told him that we did not like the deal, the fact that the letter had been  
258 returned and that his references never knew him, and that we did not want any part of the deal, and we asked him—we had also checked up with the trust company.

Q. Can you fix the date of that conversation?

The Court: When was it?

A. I cannot tell you exactly.

Q. You did not have any dealings with the bank, did you?

Mr. Fennelly: The witness was testifying to a conversation he had with Mr. Berendson. May we have the time fixed?

*Herbert Hipkins—for Government—Cross*

259

The Court: Do you know when that was?

The Witness: No, it is subsequent to this transaction.

The Court: How long subsequent?

The Witness: Just a few days.

Q. After the 3rd of February? A. Correct.

Q. From then on the matter was handled by Mr. Smith?

A. That is right. I did not have anything more to do with it.

Mr. Reis: May we have this blotter marked for identification, please?

260

(Marked Government's Exhibit 8 for Identification.)

Mr. Reis: That is all.

*Cross examination by Mr. Fennelly:*

Q. You never met this gentleman sitting next to me before? A. No, I did not.

Q. You never saw him before? A. I do not recall ever seeing him.

261

Q. When you telephoned to the office, did you state that someone answered and said he was Mr. Tryon? A. Yes, sir.

Q. Did he tell you whether or not he knew anyone by the name of Berendson? A. Yes.

Q. What did he say? A. He said he did not know him.

Q. It was a man that answered the phone? A. It was a man.

Mr. Fennelly: May I have that check, please.

Mr. Reis: Yes (handing to Mr. Fennelly).

262

*William Hart Smith—for Government—Direct*

Q. Was this check, Government's Exhibit 7 for Identification, given by you to anyone? A. No, I did not give that to anyone.

Q. Do you know whether or not anyone in your office gave it to anyone? A. Yes, I would say my cashier gave it to the messenger.

Q. He delivered this envelope? A. That is right.

Q. In which you say there were some notes? A. That is right.

263 Q. Did there come a time when this check was returned to your office? A. That would have been out of my province. I do not know.

Q. You do not know? A. No.

Q. Whose province would that be in in your office? A. Mr. Smith's.

Mr. Fennelly: That is all.

Mr. Reis: That is all.

264

WILLIAM HART SMITH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Smith, what is your occupation? A. I am a stock broker..

Q. What is the name of your firm? A. Hart Smith & Company.

Q. Are you in business for yourself? A. Yes, I am.

Q. Were you in business for yourself in 1937? A. Correct.

Q. February? A. Correct.

Q. A member of the Stock Exchange in 1937? A. No, sir.

Q. What was your business? A. We were dealers in paper securities and mortgage certificates.

Q. Where were you located? A. 52 William Street.

Q. What bank did you deal through? A. Chemical Bank.

Q. Did you specialize in any type of bonds or stocks?

A. Yes, in paper securities.

Q. Any particular issues? I am talking about January and February, 1937 now. A. All paper securities, Canadian and American. 266

Q. Did you deal in Minnesota & Ontario Paper Company gold notes at that time? A. Yes, we specialized in them.

Q. Did you buy and sell those gold notes? A. Yes, we were the market for those.

Q. You were familiar with the market price at that time? A. Yes, I was.

Q. Did your company have many trades in these gold notes at the time, January and February, 1937? A. I would say as much as any other dealer did, probably more.

Q. During your trading in those gold notes, will you tell his Honor and the jury the market prices of those gold notes in January and February of 1937? A. We recorded all our transactions as to purchases and sales made with the various brokers. I have a copy of that in here. 267

On December 31 the bonds were selling at  $9\frac{1}{4}$ .

Q. December 31, 1936? A. 1936.

Mr. Fennelly: May I inquire whether the witness is testifying from sales that he made?

The Witness: Yes, sir, they will be actual transactions.

The Court: December 31, what year, please?

The Witness: 1936. I gave the actual delivery date.

The Court: Just give us that sale. It was for what?

The Witness:  $9\frac{1}{4}$ , and the high was on January 28 when they sold at 24. Beginning in February, February 2nd, we actually made a purchase from Paine, Webber & Company at 25; high  $28\frac{1}{4}$ , February 4, and the low was February 27 at 21.

269

Q. When you say 21 you mean \$210 for each gold note?

A. Yes.

Q. When you say 28 you mean \$280 a gold note? A.

Yes.

Q. You use the multiples of 100? A. We do.

Q. Do you recall your firm purchasing 10 Minnesota & Ontario gold notes in February, 1937 from one Arnold Berendson? A. Yes.

Q. I show you this blotter marked Government's Exhibit 8 for Identification and ask you if you can tell us what those papers are. A. Those are our blotters. They record the transaction of purchase and sale for that particular day.

270

Q. This blotter referred to the purchase of 10 Minnesota & Ontario Paper gold notes from one Arnold Berendson?

A. Yes.

Mr. Fennelly: That is kept in the regular course of business?

The Court: That is kept in the regular course of business?

The Witness: Yes, that is correct.

Q. Does that reflect this sale? A. It records the purchase of 10 Minnesota and Ontario Paper 6s, gold notes.

Mr. Reis: I offer this blotter in evidence. Do you want to see it, Mr. Fennelly?



Mr. Fennelly: May I see it?

Mr. Reis: Yes (handing).

Mr. Fennelly: Are these the only sheets involved?

Q. Are these the only sheets involved in this transaction as regards Minnesota & Ontario Paper gold notes, the 10 bonds involving Berendson? A. Yes, that is the full blotter.

Mr. Fennelly: Is that one page? That is all I want to know.

272

The Witness: I see nothing else on here except that one entry.

Mr. Fennelly: I think we can have the one page as an exhibit then. That is the only one that has anything to do with the case.

The Court: Of course that is all we want.

Mr. Reis: That is all I am interested in.

Q. Give us that one page on which the entry is made concerning 10 Minnesota & Ontario Paper gold notes in the Berendson deal. A. (Witness hands paper to Mr. Reis.)

Q. That is the one? A. Yes.

273

Q. I may take this one off? A. Yes. These two are together. This shows the payment of the check. That is what I show, looking at the blotter, right here (indicating).

Q. These two sheets reflect that sale? A. Yes. It is on the back there.

Mr. Reis: I offer these two pages in evidence.

Mr. Fennelly: May I see the second sheet?

Mr. Reis: Yes (handing).

(Discussion between counsel off the record.)

(Government's Exhibit 8 for Identification received in Evidence.)

274

*William Hart Smith—for Government—Direct*

Q. Read from this blotter and tell me what gold notes were traded on behalf of Berendson. Give me the numbers. Refer to Government's Exhibit 8.

The Court: It is in evidence, those same notes.

Mr. Reis: The same notes.

The Court: It is in evidence. No use to repeat it.

Q. Was there a check issued by your firm for these 10 gold notes? A. That is correct.

275

Q. What was the check for, how much?

Mr. Fennelly: I think this exhibit merely shows certain notes, no numbers on here, are there?

The Witness: I am not sure whether there are or not.

Mr. Fennelly: This is the paper.

The Witness: Let me just see it.

Mr. Fennelly: That is characterizing the exhibits.

Q. See if there are numbers on there. A. Yes, there are numbers.

276

Q. What are those numbers from 3317— A. Looks like 3316, 3315, 3314, 3313, 3312, 3311, 3310, 3309 and 3308.

Q. Those are the ten gold notes? A. Those are the ten gold notes.

Q. Did you issue a check for those ten gold notes? A. Yes.

Q. What check number, do you know? A. No, I do not know. I can verify it.

Q. How much was the check for?

The Court: This check is in evidence.

Q. I show you this check. Is that the check for those ten notes? A. That is correct.

Mr. Reis: I now offer in evidence the check (handing to Mr. Fennelly).

Mr. Fennelly: No objection except reserving a motion to strike, your Honor.

The Court: Yes.

(Government's Exhibit 7 for Identification received in Evidence.)

Q. After this check was issued, did anything happen?

A. Why, yes. After the bonds were delivered on the 3rd, the correct delivery date on the 4th, and in case of customers or banks we usually paid immediately if they presented the securities.

278

Mr. Fennelly: February 3, 1937?

The Witness: Yes, sir. Instructions had been given to pay only a bank or Stock Exchange house. During the rush that check was paid direct, and when I inquired as to exactly what bank delivered the securities, I was told that a messenger apparently had appeared and the check had been paid direct. And naturally where deliveries of these securities are for banks—we usually do not have large dealings with the public unless we know the people. We followed that course to see what happened. We checked the references and they did not seem to coincide, or did not seem to know this individual at all.

279

Q. I show you these teletypes and ask if pursuant to instructions those teletypes were sent? A. I sent them myself.

(Marked Government's Exhibit 9 for Identification.)

Q. I show you this teletype. Did you also send that out pursuant to the references given to you by Berendson? A. Yes, we did.

280

*William Hart Smith—for Government—Direct*

(Marked Government's Exhibit 10 for Identification.)

Q. After you sent these teletypes out, what did you do?

A. We then got in touch with the United States Fidelity & Guarantee Company, who bonded this and said that we had a transaction and we were not satisfied with—

Mr. Fennelly: I object to the conversation he had with the bond company.

The Court: Sustained.

281

Q. What did you do then? A. Detective King came in.

Q. Do not give me any conversations with any detectives or any surety companies. That we are not interested in. What we are interested in is what did you do. A. I see. I endeavored to get our check back from the particular people involved because we were not satisfied with the transaction.

In the meantime the market had gone up, and my suggestion was that we turn the bonds back to him and he give our check back.

Q. Did you stop payment on that check? A. Yes.

282

Q. After you stopped payment on that check, did anybody come to visit you?

Mr. Fennelly: May we have the time fixed?

The Court: The next question will be the time.

Q. Did anyone come to visit you after you stopped payment on the check? A. Yes.

The Court: Who was it?

Q. I show you this picture—

The Court: And then fix the time.

A. This is the man, Mr. Jacobson.

Q. I show you this letter dated February 6, 1937. Does that refresh your recollection?

Mr. Fennelly: Excuse me, your Honor. He is a little too fast for me. I think that is improper. I do not know whether we know what the witness has identified.

The Court: Yes.

(Government's Exhibit 11 marked for Identification.)

284

The Court: When did this man whose photograph appears in Exhibit 11 for Identification visit you?

The Witness: I believe it was February 6.

Q. What year? A. 1937.

Q. I show you this letter. Does that refresh your recollection? A. That is the letter that he gave me.

Q. I show you this picture—

The Court: Mark the letter.

(Marked Government's Exhibit 12 for Identification.)

285

Q. I show you Government's Exhibit 11 for Identification. Can you identify this man here? A. That is Mr. Jacobson, I believe.

Mr. Reis: I offer it in evidence (handing to Mr. Fennelly).

Mr. Fennelly: No objection except my motion to strike out.

The Court: Very well.



286

*William Hart Smith—for Government—Direct*

(Government's Exhibit 11 for Identification received in Evidence.)

Q. Did Jacobson bring this letter to you (handing to witness)? A. That is correct.

Mr. Reis: I offer it in evidence (handing to Mr. Fennelly).

Please mark it in evidence.

287

(Government's Exhibit 12 for Identification received in Evidence.)

Mr. Fennelly: These are all, so that there won't be a mistake, subject to a motion to strike.

The Court: Yes.

(Mr. Reis reads Exhibit 12 to jury.)

Q. After Jacobson gave you that letter, did you have a conversation with Jacobson on that date, February 6th?

A. I did not talk very much to Jacobson, no.

Q. Was anybody present with you? A. Yes.

Q. Who? A. Detective King and Mr. Winship of the United States Fidelity & Guarantee Company.

288

Q. What did they say to you and Jacobson or did Jacobson say to them?

Mr. Fennelly: I object.

Mr. Reis: Jacobson is one of the co-conspirators.

Mr. Fennelly: That is immaterial. Assuming that is so, in this case the crime is transporting in interstate commerce from Minneapolis to here. It would appear that these bonds had already been here and were at rest and the conspiracy and the transportation had ended at this point.

The Court: You have a conspiracy charged here.

Mr. Fennelly: It would end. Once they were brought here that is the end of it, once they have come to rest, and they have come to rest here, according to the testimony.

The Court: Have they come to rest?

Mr. Fennelly: They have crossed the State lines. That is the only thing we are concerned with.

The Court: I will sustain the objection.

Mr. Reis: Will you bear with me a moment?

The Court: Yes.

Mr. Reis: The rule is that anybody who creates a market for stolen securities is the one who is responsible for them and causes their transportation. This market had not been settled. I will quote the decision here in 15 U. S. 290.

The Court: Come up here, please.

(The following took place at the bench, not in the hearing of the jury):

The Court: What are you going to prove?

Mr. Reis: I am going to prove that in order to create a market for these bonds, after these men tried to get rid of them, the defendant and the other co-conspirators, Turley, Berendson, Burns and Jacobson then set up a fictitious assignment of the claim for these ten bonds in order to show that there was a Berendson and that he went out of town; and in furtherance thereof they had Jacobson to see this man and say that he had a conversation and acted on behalf of Berendson while negotiations were going on for these ten bonds, and made a negotiation for the sale, consummation of sale, of the other fifteen bonds during this period of time, so that no bonds were at rest. There was no market. It was still in process of transportation even though the Court 291

*Colloquy of Court and Counsel*

said in the Crimmins and Seeman cases that those dealing in stolen securities create a market and are responsible for causing the bonds to be transported in interstate commerce. In the Seeman case they said it is not only transporting but causing to be transported.

Mr. Fennelly: Neither of those cases have any relation. I do not want to lose sight of the point that we are discussing. My contention is, and the witness's testimony is, that from the testimony now before your Honor it appears that some time prior to February 3 of 1937 the \$25,000 of bonds referred to in the indictment were already in the City of New York. The statute makes it a crime to either transport or cause to be transported from one State to another something, knowing it to have been stolen.

It appears from the testimony already here that these bonds being here, this crime had ended and the conspiracy had ended because its object had been accomplished, namely, the transporting in interstate commerce of stolen bonds.

The Court: Here that is part of your conspiracy, the disposition of them. Here that evidence was admitted.

Mr. Fennelly: It cannot be part of the conspiracy where the object of the conspiracy has been accomplished.

The Court: They have to be taken across State lines, or caused to be, and then also the disposition of them, the showing of the disposition of them—

Mr. Fennelly: I think not.

The Court: —is part of the conspiracy.

Mr. Fennelly: No, because it is not a crime under this statute.

The Court: They can show the whole story, it seems to me.

Mr. Fennelly: The story ends where its object is accomplished.

The Court: The object is not accomplished until they have disposed of the assets.

Mr. Fennelly: I am sorry, but under the statute—

The Court: I know the statute.

Mr. Fennelly: —that is all that makes it a crime. It is not the disposition of the stolen bonds in interstate commerce. That is not the crime.

The Court: If it is part of the conspiracy, the evidence would be admissible. I am going to receive it.

296

Mr. Fennelly: Exception.

The Court: Subject to a motion to strike out.

(The following took place in the hearing of the jury:)

Mr. Fennelly: May I have the last question, please?

(Record read.)

A. I did not pay too much attention to it, but I knew that a certain amount of discussion went on about it.

Q. But you did stop payment on the check? A. Yes, we did. 297

Q. Government's Exhibit 7, is that correct, sir? A. That is correct.

Q. That check never cleared, is that correct? A. It never cleared, correct.

Q. And ultimately you received it back? A. That is correct.

Q. And then pursuant to subpoena it was brought here? A. That is correct.

Q. Let me ask you: Do you know the defendant Bollenbach? A. Mr. Bollenbach has been to see us, not our office, but the office of Zader-Smith. I think he was over there.

298

*William Hart Smith—for Government—Cross*

Mr. Fennelly: May we have the time fixed?

The Court: Yes, fix it.

The Witness: I would say—it is rather hard to say—but between 1924 and 1928, I guess, he visited a number of times.

Q. You have not seen him since? A. I would not say I have not seen him since. I may have seen him, but we never had any dealings with him.

299

Q. I show you this picture, Government's Exhibit 5, and ask you if you know this gentleman? A. Yes, I know this gentleman.

Q. Who is he? A. His name is Burns. He sells lists.

Q. When you say "lists", what do you mean by that?

A. They are stockholders' lists.

The Court: Burns, what is his first name?

The Witness: I do not know what his first name is.

Q. If I were to tell you it was Peter Burns, would that refresh your memory as to his first name? A. I should imagine that his name is Peter Burns.

300

Mr. Reis: That is all. You may inquire.

*Cross examination by Mr. Fennelly:*

Q. Between 1924 and 1928, when you said you met Mr. Bollenbach, you did business with him at the time? A. I am not absolutely certain of that. At the time the name of our firm was Zader & Smith. As I say, he was over to see Mr. Zader. I think we did business with him, but I cannot be certain.

Q. As a matter of fact, didn't you do a substantial amount of business with him? A. It is possible. I am not sure, though. I do not know just what it was.



Q. Did you do any part of it in New York Title certificates during that period? A. At the time we had been dealing in New York Title certificates, we did.

Q. Does that refresh your recollection as to whether you did business with him in that stock? A. I am not absolutely certain. I would not be surprised if we did. I cannot say definitely no or yes.

Q. Coming back to the market quotation you gave us: Some of the dates are on December 31, 1936. You said that there was a sale at  $9\frac{1}{4}$ ? A. That is correct, sir.

Q. How about in early January? Have you got the dates in there? A. Yes, I have. Do you want the record? 302

Q. Does that show January 2nd? A. January 1st the closest one. Still at 10.

Q. No sales on the second? A. No sales on the second.

Q. On the 4th? A. 4th, yes, a sale at 10.

Q. How many? A. We sold five bonds under that same date,  $10\frac{1}{4}$ .

Q. How about around the 10th? A. None for the 10th. On the 11th it sold at  $14\frac{1}{2}$ .

Q. How many? A. Sold two.

Q. How about on the 15th? A. Nothing on the 15th.

Q. The 16th? A. The 16th we had a transaction, yes, at 18, one point. 303

Q. Is that on the 16th, did you say? A. Yes, on the 16th we paid one point, at 18.

Q. And on the 20th, have you any other? A. 20th, yes, sir. On the 20th we sold 9 bonds at 19; we bought two at 19.

Q. On the 28th, January 28th, I think you testified there was a sale at 24. A. That is correct.

Q. How many of these gold notes were sold that day? A. That happened to be a purchase on that day.

Q. A purchase? A. We bought 5 bonds from Halsey-Stuart at 24 and 5 more the same day at 24.

Q. Do you know how many bonds were offered that day?

A. It is hard to say. It was not a large market, say a 5-point market.

Q. How many bonds were bid for on that day? A. Probably about the same.

Q. Isn't it a fact from your experience that the market would go down if there are more bonds offered for sale than there are buyers? A. Correct.

Q. And at times you may have a market, for example, one point, and the offer and bid price is below that and folks offer to buy at a substantially lower price, isn't that true? A. That is correct.

Q. So the market would depend on how many buyers you have at a price? A. Well, we took—

Q. You must have a bid and offer? A. Yes. We take an actual position to be sold at. It was necessary to do it on order. They were very active around this particular time. It was possibly a 10 point market, not often, not at all times. Then there was a spread of anywhere from half to three-quarters up to a point, more or less.

Q. Let's take February 2nd. I think you quoted that day, didn't you? A. February 2nd, yes, we did.

Q. How many bonds were traded that day? A. On February 2nd we bought one from Halsey-Stuart and then sold—let me see what those were. Yes, we bought 10 from Arnold Berendson and one from Halsey-Stuart.

Q. Aside from Berendson, there was only one trade on that day? A. That particular day, that is right.

Q. Were there any bids on the market below the price, do you remember? A. I would say yes. The market was very broad at the time.

Q. Have you any recollection of what the bid was under that particular price? A. No, I do not have any definite recollection. But I do not doubt but what probably half a point under there would be the bids.

Q. For how many bonds? A. Five or ten.

Q. Have you any recollection of that? A. I am just saying at the time there was an active market. It would be what would happen. I have no definite recollection of it.

Q. Do you know what the holders of these bonds actually received per thousand in the reorganization?

Mr. Reis: I object to the question as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Fennelly: Would your Honor hear me as to the reason for it?

308

The Court: Yes, come up and I will hear you.

(The following occurred at the bench, not in the hearing of the jury:)

Mr. Fennelly: I want to show your Honor the intrinsic worth of these securities, that they had an intrinsic worth, and what happened to the owners of these bonds as filed. It is my contention, and I will give your Honor some law on the subject, that the bond is the same as a judgment, of itself it has no value. The value is merged, I say, in a cause of action and is merged in the judgment, and the real thing of value is the claim of these people filed in the court. So that they have no value. It is the intrinsic value that they would get in this reorganization.

309

The Court: What do you say about it?

Mr. Reis: I say they received a profit of \$5,000 at or about the time, whatever the difference was, and there was a manipulation when the trade took place and the market value of the stolen securities at the time, they had a considerable value.

The Court: You are asking as to a time subsequent.

310

*William Hart Smith—for Government—Cross*

Mr. Fennelly: That is what these people received. I am going to show in my case, and I think it is the law, that a claim in bankruptcy is the same as any other cause of action, once it is lodged in bankruptcy its identity is lost and it is merged in the claim, the same as a note.

The Court: In the market price what other people get for it?

Mr. Fennelly: I think not.

311

Mr. Reis: I have some cases that I gave your Honor on that point.

The Court: I will be glad to look at them. For the present I will sustain the objection.

Mr. Fennelly: Exception.

(The following took place in the hearing of the jury:)

Q. In January of 1937 you did not see Mr. Bollenbach, did you? A. I do not believe so, no.

312

Q. Did you see him in 1936 at any time, to your recollection? A. It is possible he may have come into the office, but I cannot tell about Mr. Bollenbach.

Q. Have you any recollection? A. No, I have not.

Q. You have not? A. That is correct.

Q. Your recollection, as I understand it, is that you met him when you were doing business with him and you may have done business with him between 1924 and 1928, is that right? A. That is correct, yes.

Mr. Fennelly: That is all.

Mr. Reis: That is all, Mr. Smith.

JANE RHOADES, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mrs. Rhoades, what was your business in January or February of 1937? A. Advertising.

Q. With whom were you associated? A. My father.

Q. Where was your place of business? A. 15 East 40th Street, New York.

Q. What floor? A. The tenth floor.

Q. How many rooms did you have? A. Four.

314

Q. How long were you associated with your father in business? A. We were established in 1910.

Q. How long were you in business with your father? A. 32 years—33 years.

Q. This is 1942. In 1937 had you been associated with him from 1910? A. Yes.

Q. How many rooms did you have in that suite?

The Court: She said four.

Q. On what floor were they? A. The tenth floor.

Q. How many rooms did you have in the suite? A. Four.

315

Mr. Fennelly: It is still four.

Q. Did you use all of them? A. No, we rented some of the rooms out.

Q. What was your telephone in January or February, 1937? A. Lexington 2-0364.

Mr. Reis (to the jury): I call your attention to the telephone on Government's Exhibit 11.

Q. Do you see anybody in this courtroom who was in your place of business in the latter part of January or the



316

*Jane Rhoades—for Government—Cross*

early part of February, 1937? A. That man there, I saw him coming out of the office (indicating).

Mr. Fennelly: Indicating the defendant Bollenbach.

Q. When did you see him going in and out of that office? Try to fix the date to the best of your recollection. A. The early part of February.

Q. 1937? A. Yes.

317 Q. Did you know his name at that time? A. Well; only as Berendson.

Q. How did you know it was Berendson at the time? A. My father pointed him out to me. We were going out to lunch one day, and he pointed him out to me.

Q. Did you see anybody else enter these premises besides the defendant Bollenbach at the time? A. Several people, as I went in and out.

Q. Did you ever see this man shown on Government's Exhibit 5 with the defendant Bollenbach in your premises at the time? A. I saw him go in and out. I cannot say I saw him with the defendant here.

318 Q. You did see this man? A. Yes.

Q. Showing you Government's Exhibit 5, a photograph of Peter W. Burns? A. Yes.

*Cross examination by Mr. Fennelly:*

Q. Miss Tryon, did you testify on the trial of some of the other defendants a year ago, I guess it was? A. I was a witness, yes.

Q. Didn't you testify at that trial that you had rented an office to Mr. Berendson? A. I do not remember.

Q. But, in fact, you say that you did not rent an office to Mr. Berendson, is that right? Now you have testified

that you personally did not rent the office to him. A. That is right.

Q. Were you ever introduced to anyone under the name of Mr. Berendson? A. I was not introduced to him, no.

Q. Did anybody bring anybody by the name of Berendson to see the office of Mr. Berendson? A. No.

Q. In January or February of 1937 did you keep any records of any nature in your business? A. We kept records when we got checks.

Q. Well, now, did you keep any records showing to whom you had rented either rooms or mailing privileges? A. No.

320

Q. So you had no records showing at any given time who it was that had desk space or office space or mailing privileges with you? A. No.

Q. What kind of advertising business was it that you were in in 1937 in January? A. Has that to do with this case?

Q. Well, I would like to know, if you do not mind. A. It was an advertising business.

Q. What kind of advertising? A. Hotel advertising.

Q. What was the nature of the business? What advertising did you do? A. Does that have to do with this case?

321

The Court: Can you answer it?

The Witness: We just did hotel advertising; we advertised hotels.

The Court: All right. Answer the questions.

Mr. Reis: Just answer the questions, please.

Q. Where did you advertise the hotels? A. In publications throughout the United States.

Q. Such as what? A. Many publications.

Q. Would you name one of them? A. Well, Parents Magazine.

322

*Jane Rhoades—for Government—Cross*

Q. What hotels did you advertise in that in January of 1937? A. January 1937? You see in our advertising business you get many accounts and lose them all the time and get new ones. So you will have to let me think a minute.

Q. All the time in the world. A. Well, we were working on a summer hotel at the time, the Crawford House, Crawford Notch, New Hampshire.

Q. Did you do business for them in January, 1937? A. Yes, sir.

323

Q. In addition to your advertising business you had the business of renting mailing privileges, did you not? A. Renting offices and mailing privileges, yes. When our business got a little bit poor we rented some of our office out.

Q. Did you rent office space and mailing privileges over a period of some years? A. About six or seven.

Q. That is, prior to 1937? A. Oh, maybe a year or so.

Q. Prior to that time? A. Yes.

Q. Do you know of your own knowledge what space, if any, this Mr. Berendson had rented? A. Next door to our own office, known as Room 1004.

Q. A private office? A. Yes.

324

Q. And it had entrances in the hall, into the hall, and direct entrances to the public corridor? A. That is correct.

Q. Was there any name on the door, do you recall? A. I do not recall.

Q. Of Berendson? A. I do not recall.

Q. You do not recall that? A. No, I do not.

Q. When is it that you say you first saw Mr. Berendson in that office? A. The early part of February.

Q. What date? A. I cannot recall that.

Q. What time of the day was it? A. In the early afternoon.

Q. In the early afternoon? A. Yes, because I get in late, as a rule.

Q. Was he in the private office that Mr. Berendson had rented? A. No, he was coming out of the office.

Q. Out of what office? A. 1004.

Q. Was that the office that Mr. Berendson had rented? A. Yes.

Q. He was coming out of it the first time that you ever saw him? A. Yes.

Q. Did he have a hat and coat on? A. I do not recall.

Q. You do not recall whether he had a hat or a coat on? A. No, I can remember faces but not remember what people have on for a length of time.

326

Q. You came out of the elevator to go into your office? A. No, I was leaving my office with my father to go out, as I said before.

Q. You left your office with your father to go out. What time did you say it was? A. Early afternoon. We were probably going to lunch.

Q. Mr. Bollenbach was coming in or going out? A. Coming in or going out?

Q. Was Mr. Bollenbach coming in or going out? A. He was coming out of his office, as I said before.

Q. Did he go down in the elevator? A. I do not recall that.

327

Q. Did you go down in the elevator with your father? A. I could not walk. It was ten stories.

The Court: Did you?

The Witness: Yes, certainly.

The Court: Just answer.

Q. Did you? Please tell us. A. Yes, I went down in the elevator.

Q. Did this Mr. Bollenbach go down in the elevator with you? A. I said I do not recall.

328

*Jane Rhoades—for Government—Cross*

Q. Do you recall seeing him going anywhere? A. No, I do not. He may have gone to the men's room. It was on the same floor.

Q. You have no recollection of whether he had a hat or coat on? A. No, I do not.

Q. He just passed you? A. That is right.

Q. Did he have his eyeglasses on at the time? A. I do not recall.

Q. You just passed him walking back, is that correct?

329

A. That is correct. I saw him after that several times, going in and out.

Q. On this first occasion you just passed him going by?

A. That is right, coming out of the office.

Q. When was the next time after the first occasion when you say you saw Mr. Bollenbach passing that you next saw him? A. It might have been several days. I do not just recall how long.

Q. Will you please give us your best recollection and try to fix the date? A. That I do not believe I could do truthfully, because it was several days later.

Q. As long as a week? A. No, several days later.

330

Q. What time of the day was it when you next saw Mr. Bollenbach? A. You mean after the first time?

Q. Yes. A. I cannot tell you. I do not know—do not recall.

Q. Where was it you then saw him? A. Always in the hall, going in and out.

Q. Were you alone or were you with someone when you saw him the next time? A. I do not remember.

Q. On the second occasion did he have a hat or coat on? A. That I do not remember.

Q. Did he have eye-glasses on? A. I do not remember.

Q. All that happened the second time was that this man passed you, is that right, in the hall? A. That is right.



Q. Were you going in or out of the building on that occasion? A. I must have been going out or coming in.

The Court: Were you coming in or going out?

The Witness: I do not remember whether I was going out or coming in.

Q. Do you know whether or not Mr. Bollenbach was going either in or out of the building? A. No, I do not.

Q. Did you leave the elevator with him? A. No, I do not recall that I was ever in the elevator with him.

Q. Was he alone? A. Yes, I saw him alone always.

332

Q. Never saw him with anyone? A. No.

Q. Was there any other occasion that you saw Mr. Bollenbach? A. I said several times. I saw him going in and out of the office.

Q. You have told us about two. Was there another one?

A. It may have been three or four times. I do not recall.

Q. Tell us, if you will, when was the next time, to the best of your recollection, that you saw Mr. Bollenbach in that building. A. Well, I never saw him any place but in the building, coming in and out of his office.

Q. Won't you tell us when was the next time that you saw him? A. Several days later.

333

Q. Several days later? A. The same as I answered before.

Q. Do you recall whether or not you were going out of your office or coming into it? A. No, I do not recall. We do not count the times we go in or come out of there.

Q. You have no recollection of whether you were going out or whether you were coming into your office on the third occasion when you saw him? A. No, I have not.

Q. Did Mr. Bollenbach have an overcoat on on that occasion? A. I said I do not recall what he had on.

Q. Did he have a hat on? A. I told you I do not recall.

334

*Jane Rhoades—for Government—Cross*

Q. Was he going in or coming out of the premises? A. He was going in or coming out of his office.

Q. But you do not know which? A. No.

Q. You have no recollection? A. No.

Q. Was that in the office of Mr. Berendson? A. It was in the office that was rented to him, 1004.

Q. That was rented to Mr. Berendson? A. That is right.

Q. No one introduced you to anyone by the name of Mr. Berendson, is that right? A. No.

335

The Court: Did you see anybody else besides this defendant there?

The Witness: Well, I saw people going in and out, men going in and out, but when I rent an office I have no reason to go into the office after it is rented.

The Court: You like to argue, don't you? Why don't you answer the questions?

Q. After this third occasion that you have just testified about, did you ever see Mr. Bollenbach again? A. I saw him on several occasions, three or four times, possibly.

336

Q. Was there a fourth time? You have testified to three separate occasions when you passed him in the hall, when you said you did not know whether he had a hat or coat on or whether he had his eyeglasses on or was coming out or going in and you did not know whether you were going out or coming in. Was there a fourth occasion? A. I do not recall.

Q. Did you ever talk to a detective known as Archibald Woods of the New York Police Force? A. No.

Q. Did you ever see him in your office? A. I do not recall any detective being in the office when I was there.

Q. In 1937 did you comply with the postal regulations, filing with the Post Office the names of the people who were taking mail in your office? A. Well, I do not recall if we

had any mail addressed for anybody at that time. We rented an office then.

Q. Didn't you have people receive mail in your office at that time? A. I do not recall that we ever kept mail for anybody. I think we just rented the office.

Q. Didn't you get mail for Mr. Berendson? A. I assumed if the postman put it through the door.

Q. Your door? A. No, 1004.

Q. But you do not recall whether there was any mail in care of you, do you?

The Court: She said a man had an office there.

338

The Witness: Yes; would not pay \$20 for a mailing address.

Q. You have identified, I believe, this picture on Government's Exhibit 5 as the man, which is a picture of Mr. Burns, as the man you saw? A. On several occasions going in and out of the office, that is right.

Q. Was he going in and out of your office? A. No.

Q. Was this the room that was rented to someone by the name of Berendson? A. That is right. He would have no reason to come into our office.

Q. Were you ever introduced, did anybody ever introduce you to this man (indicating)? A. No.

339

Q. Whose picture is on Government's Exhibit 5? A. No.

Q. As far as you know you do not know, do you, of your knowledge whether the man who is pictured as this Mr. Burns, he never rented any office from you, did he? A. I do not believe so, no.

Q. And you were never present when he rented any office from your father, were you? A. No.

Q. Can you tell me the last date, to the best of your recollection in February, 1937 that you saw Mr. Bollenbach in the corridor outside of your office? A. Oh, I would say prob-

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*Jane Rhoades—For Government—Cross*

ably a week and a half later, about two weeks. After that I did not see him any more.

Q. That would be around the middle of February? A. That is right.

Q. When was the first time that you were ever interviewed by anyone about this case? A. I did not hear you.

Q. About this case. A. It was about a year ago, I believe.

Q. In 1941? A. That would be a year ago, wouldn't it?

341

Q. When was it? A. It was just about a year ago, I believe I was down there.

Q. Who was at the interview? A. I was called to Mr. Reis's office.

Q. Is that the first time since 1937 that anyone interviewed you about this case? A. Yes.

Q. Did there come a time when you were asked to go into a court room and look at Mr. Bollenbach? A. No.

Q. Didn't you at sometime go into the court room and look at Mr. Bollenbach? A. I was told to go into the court and see if I recognized any of the occupants of the court. There were about two hundred people. I did not. It was quite crowded, so I sat up in the back.

342

Q. Mr. Milenky was with you? A. No, I won't say with me.

Q. Was anyone from the FBI with you? A. I was asked to go into court and look around, which I did, and I did not see anyone I recognized for a little while.

Q. Excuse me just a minute. When you came down to the building whom did you see? A. I saw Mr. Reis and Mr. Milenky was in the room.

Q. That is in what month? A. Well, it was about a year ago. I just cannot tell the month. I am sorry.

Q. The Spring or the Fall, this time of the year? A. It was cold weather, yes.

Q. Sometime in 1941? A. From the office of Mr. Reis.

Q. Was Mr. Milenky with him? A. He was sitting in the office when I was interviewed.

Q. The same day did you see Mr. Bollenbach in this building? A. I am telling you what happened.

Q. Just answer my question. Did you see Mr. Bollenbach in the building? A. Yes, after being in the court room about five minutes I looked around and did not recognize anybody. I remained there and then I saw a man's face that I recognized. He had previously had his head down.

Q. This was four years, more than four years, after the third occasion when the man passed you in the hall, is that right? A. No, I said I saw him on several occasions.

344

Q. Outside of your office you have testified that on three occasions you saw this man.

The Court: Three or four, I think she said.

The Witness: That is right.

Mr. Fennelly: She said three or four, I think. When we came to the last one she could not remember it. I do not care. Let it be four times, this man before you in the hall.

Q. Now the next time that you saw him you say was four years later, is that right? A. I have got a very good memory for faces.

345

Q. Wasn't it four years later that you saw him? A. Yes.

Q. In the court room, and you say that you remembered the man? A. That is right.

Q. Mr. Milenky did show you pictures before that, did he not? A. Showed me pictures of several people.

Q. And he showed you a picture of Mr. Bollenbach, didn't he? A. Yes.

Q. You never testified before the grand jury, did you? A. I was in a room with Mr. Reis with a lot of people. I



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*Jane Rhoades—for Government—Cross*

do not know if it was the grand jury or not. I have never been before a jury.

Q. When was this that you were before the grand jury?

A. I believe it was several days after the time I was down here first, about a year ago.

Q. That was in 1941? A. That is right.

Q. I mean in connection with the return of this indictment, which I think shows was returned in November of 1939.

347

Mr. Reis: She did not appear there. I said she was not before the grand jury.

Mr. Fennelly: All right, I will accept your concession.

Q. The first time that you ever had a question and answer statement was after Mr. Milenky had shown you a photograph of Mr. Bollenbach? A. Among other photographs.

Q. But he did show you one of Mr. Bollenbach, isn't that true? A. A picture. He was among them.

348

Q. That was the first time that you had ever had a question and answer statement of yours taken, is that true? A. No, I was interviewed when I first came down here in Mr. Reis's office.

Q. What date was that? A. I do not recall.

Q. Was that prior to the time you have already testified to? A. I do not recall. I was down here about a year ago, called down to Mr. Reis's office.

The Court: That is the occasion about which you testified a while ago?

The Witness: Yes.

Q. At the time was a question and answer statement taken of you by Mr. Reis, if you recall? Was a stenographer present? A. Was there a stenographer present where?

Q. In Mr. Reis's office? A. Yes.

Q. On the date you saw him? A. Yes.

Q. There was a question and answer statement taken?

A. Yes.

Q. Was that the first time— A. Yes.

Q. —that you had a statement taken? A. Yes.

Q. Mr. Milenky was there, was he not, on that same occasion? A. I was here three or four times, you see. I cannot remember. I do not believe I remember.

Q. At the trial of these other defendants you were married then, were you not? A. I was married August 14, 1941.

350

Q. Was that before or after you had testified in that case? A. I testified then in November.

Q. So you were married when you testified? A. That is right.

Q. You gave your name as Jane Tryon. Your married name was Mrs. Rhoades? A. That is right.

Q. Did you give your maiden name? A. I believe because at the time Jane Tryon—

Q. Did your attorneys know you were married at the time? A. Oh, yes.

*Redirect examination by Mr. Reis:*

351

Q. Miss Tryon, at the time you were in my office in this building Mr. Milenky and Mr. Keating were present, weren't they, or was it just Mr. Milenky and myself? A. The first time I came down Mr. Milenky came with me, but later I believe Mr. Keating came in.

Q. You recall Mr. Milenky picking out an envelope of this type and taking out a bunch of photographs and putting them in front of you on the table and asking you whether or not you could identify anybody in those photographs? A. He was showing a great many photographs and asking me to identify any of them.

352

*Jane Rhoades—for Government—Recross*

Q. You were asked if you could identify anybody in those photographs, is that correct? A. That is right.

Q. You were shown no photographs which were identified by Mr. Milenky? A. No.

Q. Did you make your own identification at that time of any individuals that you remembered seeing in your place of business? A. Certainly, yes.

Q. Were these amongst the photographs shown to you (handing witness)? A. Yes.

353

(Marked Government's Exhibits 13 and 14 for Identification.)

Q. I show you Government's Exhibit 5, Peter Burns. Was that one of the photographs you also identified at that time? A. Yes.

Q. A picture of Burns? A. Yes, sir, there was another one, a tall length picture.

Q. A tall length picture of Burns? A. Yes.

Q. Do you recall any distinguishing marks on Peter Burns's face? Do you recall the other man that you say that you saw besides Bollenbach, Peter Burns, was up there, do you recall any distinguishing marks on his face? A. I believe there was a scar. I may be wrong.

354

Q. What type of scar, do you recall? A. A sort of gash.

Q. What? A. A sort of gash, a scar (indicating).

Q. A gash or a burn, which is it? A. It seems to me it was a gash. It was a scar that I saw.

Mr. Reis: That is all.

Mr. Fennelly: One question that I overlooked asking the witness.

*Recross examination by Mr. Fennelly:*

Q. I believe you said in answer to my question that you did not recall upon the trial of the other defendants a year

ago that you testified that you had rented out space to someone by the name of Berendson. Didn't you answer that you did not recall it? A. I do not recall.

Q. Do you remember being asked on that trial by Mr. Reis this question:

"Q. Did you ever rent out space to a man named Berendson around February 1, 1937?"

The answer was: "Yes, sir."

A. I may have said that because my father and I were associated in business.

356

Q. But the fact is that you now testify that you yourself did not rent out any space to anybody by the name of Berendson, isn't that so? A. Well, whoever was in the office at the time, and I mean the office—

The Court: No.

Q. Would you please answer the question? A. I did not rent the office to Mr. Berendson.

Q. You did testify on the trial a year ago that you did, isn't that so? A. Well, I say we were associated together.

Q. I am asking you if you did not so testify a year ago that you did rent it? A. I do not think—

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Mr. Reis: May I have the question and answer read to her so she can answer?

The Court: He just read it a few minutes ago.

Q. Didn't you so testify?

The Court: She said "I do not recall." She just said that.

Q. After I read the question and answer do you still say that you do not recall whether you so testified or not? A. No, I do not. I am telling the truth. That is all.

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*David Schnapp—for Government—Direct*

Q. Were you telling the truth then? A. I always tell the truth.

Q. You do tell the truth then all the time? A. I know about the space and was associated in business at the time—

Q. Did you state the truth at the time? A. I did not personally rent the office. I was out. So my father rented the office, that I know.

Mr. Fennelly: As to her answer being truthful, I move to strike out the answer.

359

The Court: Yes, strike it out. Your answers were truthful? Were your answers truthful?

The Witness: Well, I think it was.

(Witness excused.)

DAVID SCHNAPP, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

360 Q. Mr. Schnapp, in January of 1936 by whom were you employed? A. The National Safety Bank & Trust Company of New York.

Q. Located where? A. Broadway and 38th Street.

Q. How long were you associated with that bank, Mr. Schnapp? A. All told about thirteen years.

Q. What were your duties at that time? A. At the time I was the manager of a plan known as the Checkmaster Plan.

Q. In 1935, in December, what were your duties? A. I think I was the department head.

Mr. Fennelly: Objected to as immaterial.

The Court: I cannot tell.

Mr. Reis: I will connect it up, Judge.



A. (Continued) I was the department head, sir.

Q. I show you a photostat of an account card No. 7580 and ask you if you recognize it? A. Yes, sir, I do.

Q. What is it?

Mr. Fennelly: I object to it.

A. This is a form signature card.

The Court: There is an objection.

Mr. Fennelly: "Form signature card," that is all right.

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Q. Opened in whose name? A. Opened in the name of Robert C. Wilson.

Mr. Fennelly: I object.

The Court: Subject to connection.

Mr. Fennelly: I think we might as well discuss it with your Honor now. I think it will save time.

The Court: Come up and bring your book.

(The following proceedings were had not in the presence of the jury.)

Mr. Fennelly: I assume Mr. Reis is starting to go into and show similar transactions.

363

The Court: What is your point?

Mr. Reis: This was the account used to clear the 20 bonds stolen from the Court of Chancery at Wilmington, Delaware, and in this proceeding to show the same intent in this case.

Mr. Fennelly: I would like to call your Honor's attention to the law of this circuit. The cases hold that where you can show a similar act is an exception to the general rule, and you can only show them in cases where the act done may be either innocent or unlawful, depending upon whether the intent is that it was bad or good.

*Colloquy of Court and Counsel*

In this case that is not so. If Mr. Bollenbach transported or caused stolen bonds to be transported, that can only be unlawful. There cannot be anything innocent about it. So there is no occasion to show a similar act or to show intent. If he knows about those things and had taken or transported those bonds or was a part of the conspiracy to do it, there can only be one thing, and that is that it is unlawful and a crime.

I refer in my brief to the case of *Harvey v. The United States*, 23 Fed. 2nd, and other cases, all in this circuit, on the same subject matter.

It is so important that I ask your Honor to give it careful consideration before you admit any testimony about it.

Mr. Reis: The *Seaman* case, which is more recent, says that you can show the transaction, so does the *Crimmins* case.

Mr. Fennelly: In the *Seaman* case they held that it was the same conspiracy. (handing brief to the Court).

The Court: I will receive it on the ground of intent. I am familiar with those cases.

Mr. Fennelly: Your Honor will overrule my objection?

The Court: Yes.

Mr. Fennelly: Exception.

The Court: Yes.

(The following proceedings were had in the presence of the jury.)

Mr. Reis: May I have the last question and answer, please?

(Record read.)

*Colloquy of Court and Counsel*

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Mr. Fennelly: You overruled my objection to that as being incompetent, immaterial and irrelevant?

The Court: I ruled upon it at the bench. If you want to include that, very well.

Mr. Fennelly: I better do that in case I want to take it up.

The Court: You have done it as to that question. You have an objection and exception.

Mr. Reis: I offer this card in evidence.

Mr. Fennelly: I object to it as not binding, not a record of the bank.

368

The Court: What is it? I have not seen it.

Mr. Reis: Photostat of the opening account under the name of Robert C. Wilson.

The Court: What is your objection?

Mr. Fennelly: I think if it is not the original record of the bank there is no relevancy or materiality and no connection with this case.

The Court: Where is the original?

Mr. Reis: I cannot locate it.

The Court: If you want to go through the proof, show the efforts made to find it.

Mr. Fennelly: I would like to see the original card.

369

The Court: I am asking for the proof. Do you want the proof offered? They have not been able to find it.

Mr. Fennelly: I must find the original card.

The Court: If they cannot find it, they cannot give it to you.

Mr. Fennelly: They would have to prove—

The Court: Do you insist upon that?

Mr. Fennelly: I assume they have to.

The Court: No one wants you to accept it.

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*David Schnapp—for Government—Direct.*

Mr. Reis: I think the rules do require—

Mr. Fennelly: I object.

The Court: Sustained. Mark it for identification. Bring the bank and anybody else and prove that the original is lost. Mark this exhibit for identification.

(Marked Government's Exhibit 15 for Identification.)

371

Q. I show you this transcript of the account of Robert C. Wilson. Was that produced pursuant to a subpoena served upon the bank? A. Yes, it was.

Mr. Reis: I offer it in evidence.

The Court (addressing the witness) Anything that you want to say here, say it to the District Attorney.

Mr. Fennelly: Fix the date.

Q. Can you fix what time that transcript refers to? A. That one was 1935.

Q. 1935.

372

Mr. Reis: May I have this marked in evidence, please?

(Marked Government's Exhibit 16.)

Q. Getting back to Government's Exhibit 15 for Identification, do you recall when I subpoenaed the bank records about a year and a half ago and I showed you this card and asked you where the original was?

Mr. Fennelly: I object to the form of the question.

The Court: Sustained. Did you make any effort to find the original?

*David Schnapp—for Government—Direct*

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The Witness: Yes, sir, I did.

The Court: What effort did you make?

The Witness: We searched our original records.

The Court: Where were the records kept?

The Witness: In the signature file. If I am not mistaken they were removed at one time by one of our attorneys, and then we lost sight of it.

The Court: Who were the attorneys?

The Witness: A young man by the name of Buchwalter who used to handle the cases.

374

*By the Court:*

Q. Removed where? A. There was some question about that.

Q. You say they were removed? A. Yes.

Q. Did you search where the files were? A. Yes.

Q. Did you make a thorough search? A. Yes.

Q. Did you find it? A. No.

Q. You produced the photostat? A. That photostat was made by the Department of Justice.

Mr. Reis: I now offer this in evidence, Exhibit 15 for Identification (handing to Mr. Fennelly).

375

Mr. Fennelly: Has the witness testified whether this is the photostat and has he any knowledge as to the original paper?

The Court: Look at that. Is that a photostat?

The Witness: Yes, it is.

Mr. Reis: I now offer it in evidence.

Mr. Fennelly: I withdraw my objection, if your Honor please.

The Court: All right.

(Government's Exhibit 15 for Identification now received in evidence.)



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*Archibald J. Woods—for Government—Direct*

New York, November 25, 1942;  
10.30 A. M.

ARCHIBALD J. WOODS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. You are an employee of the police force of the City of New York, Detective Woods? A. Yes, sir.

377 Q. And in 1937 you also were also a detective? A. I was.

Q. Pursuant to your duties did you have occasion to investigate with reference to one Arnold Berendson some time in 1937? A. I did.

Q. Will you tell his Honor and the jury what you did? A. I was called to the National Safety Bank where I was shown a check for \$2,500.

378 Q. I show you this check; Government's Exhibit 7, and ask you if this was the check that you were shown? A. Yes, sir. The check was made payable to Arnold Berendson and was drawn on the Chemical Bank. The endorsement had been typewritten. I went to 10 East 40th Street to investigate relative to the man Berendson, as that was the address given at the bank. I found there was no Berendson at that address.

Q. As a result of a telephone call you went to 17 East 40th Street? A. I went to 15 East 40th Street and there I met a man named Tryon, who had conducted a mail renting space, and asked him if he knew Mr. Berendson.

Q. Can you describe Tryon to the best of your ability? A. He was an elderly man, probably around 65 or 70, with a beard.

Mr. Fennelly: No examination,

DAVID SCHNAPP resumed the stand.

*Direct examination continued by Mr. Reis:*

The Court: Just a moment.

Mr. Reis: Yes.

The Court: The testimony of this witness, as I understand it, relates to another alleged offense. Of course, the defendant is not being tried for any other charge except the one on trial, that is, the transportation or causing to be transported in interstate commerce of these stolen securities and a conspiracy so to do. The evidence which is being received is being received only for the purpose of showing the knowledge or intent of the defendant. That is the sole purpose for which this evidence is being received. The defendant is not being tried upon this charge. The witness has testified—

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Mr. Reis: That is for another transaction. But I will have him testify to something that will pertain to this charge.

The Court: The jury have in mind what the charge is here, the transportation or causing to be transported in interstate commerce of these alleged securities, and a conspiracy. The evidence relating to any other offense, has to do only with the intent and knowledge on the part of the defendant. That is the sole purpose for which it is being received, and for no other purpose.

381

All right.

Q. Mr. Schnapp, you identified yesterday the signature card in the transcript of the bank account of Robert C. Wilson, Government's Exhibits 15 and 16. I now show you a check dated December 18, 1935, and ask you whether or not

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*David Schnapp—for Government—Direct*

this check was deposited in the Robert C. Wilson account at your bank? A. Yes, sir, it was.

Mr. Reis: I offer this check in evidence (handing to Mr. Fennelly). What number will that be, Mr. Clerk?

The Court: That will be 17.

Mr. Fennelly: Objected to as immaterial and irrelevant and incompetent, and as having no bearing in this case.

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The Court: That is the objection you urged at the bench yesterday.

Mr. Fennelly: Yes, in connection with it.

The Court: You mean it charges something else?

Mr. Fennelly: Yes, and not in connection with this defendant, as shown—

The Court: I will take it subject to a motion to strike.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 17.)

384 Q. I show you this deposit ticket and ask you if that deposit ticket is a form issued by your bank, and being similar to the amount on the check, Government's Exhibit 17, for deposit? A. Yes, it is.

Mr. Reis: I offer it in evidence. That will be 18 (handing to Mr. Fennelly).

The Court: That is the deposit slip?

The Witness: Yes.

Mr. Fennelly: Same objection (handing to Court).

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 18.)

Q. I show you a check dated December 20, 1935, and ask you if this check was deposited in the Robert C. Wilson account in your bank? A. Yes, sir, it was.

Mr. Reis: I offer this check in evidence.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 19.)

Q. I show you a deposit slip, the account of Robert C. Wilson, dated December 20, and ask you if this reflects a deposit of the check, Government's Exhibit 19? A. Yes, sir. 386

Q. May I see the check, please? A. Yes (handing to counsel).

Mr. Reis: I offer the deposit slip in evidence.

The Court: How much is the check for?

The Witness: \$1,858.45.

Q. And this check is \$1,870.96?

Mr. Fennelly: May I see the second one, please? 387

Mr. Reis: Yes (handing to Mr. Fennelly).

Mr. Fennelly: Would your Honor inquire whether or not this is the original from the bank files, this last exhibit?

Mr. Reis: That is a copy which was furnished to the United States Attorney's office pursuant to a subpoena, by the bank.

The Witness: Yes, sir.

Mr. Fennelly: I object to it. I want the original deposit ticket. This looks like a typewritten document.

The Witness: That is the original.

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*David Schnapp—for Government—Direct*

Mr. Fennelly: That is what I asked.

Mr. Reis: I offer it in evidence.

Mr. Fennelly: The general objection, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 20.)

389

Q. I show you a check dated December 20, 1935, made payable to cash and signed Robert C. Wilson, and ask you if that check cleared through your bank? A. Yes, sir, it did.

Q. What date was that cleared? A. The check was cashed—

The Court: How much was it for?

The Witness: \$1,800.

Q. Take it out. A. It was cashed on December 20, 1935.

Mr. Reis: I offer this check in evidence.

Mr. Fennelly: The general objection.

The Court: Same ruling.

390

Mr. Fennelly: Exception.

(Marked Government's Exhibit 21.)

Q. I show you a check dated December 23, 1935, signed by Robert C. Wilson, cash, \$1,925, and ask you if this check cleared through your bank, on that account? A. Yes, sir, it did.

Q. On what date? A. December 23, 1935.

Mr. Reis: I offer this check in evidence.

Mr. Fennelly: Same objection.

The Court: Same ruling.



Mr. Fennelly: Exception.

(Marked Government's Exhibit 22.)

Q. Is it the practice of the bank after checks clear for payment to send the cancelled papers and a statement to the person having an account with the bank? A. Yes.

Q. Were these checks, Government's Exhibits 20 and 22 and the deposit tickets, Exhibits 19 and 21, returned to Wilson? A. Well, the checks were mailed and the deposit tickets are retained by the bank as permanent records.

392

Q. Was the bank served with a subpoena duces tecum to produce the records in the Wilson account? A. Yes.

Q. Pursuant to the subpoena duces tecum did you produce Government's Exhibits 21 and 22 and the deposit ticket? A. Yes, sir.

Q. Look at them. Is that so (handing witness)? A. Yes, sir.

Q. Can you explain how the bank had possession of these accounts and vouchers instead of having them in the possession of the account?

Mr. Fennelly: I object.

393

The Court: I will let him say what the usual course is with reference to checks, as to their usual course.

The Witness: Yes, sir, it is the policy of the bank to mail cancelled papers. Originally those were mailed to the depositor and were returned to us by the Post Office Department with the notation marked thereon "Unknown at the address given."

Q. So that the bank produced these records? A. Yes, sir.

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*David Schnapp--for Government--Direct*

Q. I am talking about the records of the account of Robert C. Wilson.

The Court: He said so three times.

Q. Does the bank make a duplicate of the transcript of account, or is the transcript of account mailed to the depositor?

The Court: There are two questions there.

Mr. Reis: Question withdrawn.

395

Q. Does the bank mail the transcript of account to the depositor? A. Yes, sir, we do.

Q. Was the transcript of account also mailed to the depositor, Robert C. Wilson? A. Yes, sir.

Mr. Fennelly: If he knows.

The Court: Is that the procedure?

The Witness: Yes, sir, it is.

Q. Was that also returned "Addressee unknown" to the bank? A. Yes, sir.

396

Q. Now Mr. Schnapp, can you tell me how much was left in the account of Robert C. Wilson pursuant to the items on Government's Exhibit 16? A. No balance remained in this account at all.

Q. Just look. A. There was \$9.16, and the account was closed out, leaving no balance whatsoever.

Mr. Fennelly: May we have the date, please?

The Witness: There is no date on this, sir.

Q. Tell us the date the account was opened? A. It was opened December 19, 1935 with an initial deposit of \$5, and the last item in the account, \$1,925 was made on December 23, 1935, leaving a balance of \$9.16.

Q. Is that amount still in the bank? A. Yes, sir, we are holding it.

Q. And nobody ever claimed that amount from the bank, to your knowledge? A. No, sir.

Q. When did you leave the bank, Mr. Schnapp? A. September 15, 1942.

Q. I show you this card. What is it? A. That is the original signature card, regular form of card signed by one Arnold Berendson, Account No. 35979.

Q. When was the account opened? A. February 3, 1937.

The Court: This is the account we are talking about today?

The Witness: This is the Arnold Berendson account.

Mr. Reis: This is the Arnold Berendson account. I offer this in evidence.

Mr. Fennelly: This will be 23?

The Clerk: Yes.

Mr. Fennelly: I object to the handwriting on the back of it, your Honor, and also the general objection to the exhibit.

Mr. Reis: I have no objection to blocking out the back part of that. I would like the clerk to block it out (handing to the Court).

The Court: All right. This back will be blotted out. Put the paper front up and show the exhibit to the jury now and take it back.

Mr. Reis: All right.

The Court (Addressing the jury): When you see it, you will not look at the back of it. Put a paper over it.

(Marked Government's Exhibit 23.)

Mr. Reis: I have a photostat of that.

400

*David Schnapp—for Government—Direct*

The Court: They may use any substitution.

Mr. Reis: I will use the substitution and show it to the jury.

The Court: Mark on the back "Exhibit 23" so we will know what it is.

Mr. Fennelly: You may substitute it entirely.

The Court: All right, substitute it entirely.

Mr. Reis: That is all right with me.

(Substituted exhibit marked in place of the original—Exhibit 23.)

401

Q. In looking at that exhibit could you tell the type of account that was that was opened, showing you this Exhibit No. 23? A. Opened up under our Checkmaster plan.

Q. What is the Checkmaster plan? A. A plan whereby a customer may open up an account without any maximum requirements. As little as one dollar would be accepted.

Q. Was the Robert C. Wilson the same type of account? A. Yes, sir, it was.

Q. I show you a booklet with a metal tag on a piece of paper, dated February 3, and ask you to identify this.

402

The Court: February 3 what year?

Q. February 3, 1937? A. This is the book, the regular passbook, issued by the bank when a new account is opened. This little book has a little identification key which is given to the customer at the same time, and the piece of paper is a delay slip which advises the customer when he may draw against the check he has deposited.

Q. Was that issued by your bank at the time the account was opened? A. Yes, sir, it was.

Mr. Reis: I offer those three items as one exhibit, if your Honor please.

*David Schnapp—for Government—Direct*

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Mr. Fennelly: Same general objection.

The Court: Yes. The same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 24.)

Q. I show you a form check book marked Checkmaster, with the exception of certain checks which are drawn from it, and I ask you if that is in general form the type of check book issued to one who opens an account in the bank under the Checkmaster plan? A. It is.

Q. Under the Checkmaster plan this is the type of checkbook received? A. Yes, it is, sir. 404

Mr. Reis: I offer this in evidence.

Q. I am talking about February, 1937? A. The same thing.

Mr. Fennelly: No objection.

(Marked Government's Exhibit 25.)

Mr. Fennelly: There is a little notation on there. Would you mind having that stricken out?

The Court: All right.

Mr. Reis: Strike it out with a leadpencil, Mr. Clerk. 405

Q. Before I give these Exhibits 24 and 25 to the jury, will you tell us how much this account was opened with? A. \$2,500.

The Court: Which account is this?

Mr. Reis: Arnold Berendson. I refer to the exhibit number, Judge.

The Witness: \$2,500.

Q. Was it cash or a check? A. It was a check.



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*David Schnapp—for Government—Direct*

Q. I show you Government's Exhibit 7 and ask you if you can identify this exhibit? A. This is a check for \$2,500 drawn on the Hart Smith & Company account, Commercial Bank & Trust Company, and was made payable to Arnold Berendson and was certified by the Commercial Bank & Trust Company on February 3, 1937. It was deposited with opening—

Q. When you say "us", you mean whom? A. National Safety Bank & Trust Company.

407

Q. On what date? A. This check was deposited with the National Safety Bank & Trust Company on February 5, it looks like.

The Court: This is the check that opened the account?

The Witness: That is the check.

Q. Did you see that check on the date the account was opened? A. Yes, sir, I did.

Q. What did you do? A. Because of the appearance of the item—

The Court: What did you do?

408

Q. What did you do? A. I called Hart Smith & Company and asked for what this check was in payment for.

Q. After calling the clerk at Hart Smith & Company, what did you do? A. We tried to check the references and could not do that. I became suspicious—

Q. Wait a minute now. Did you make an effort to locate Arnold Berendson? A. Yes, sir, we did.

Q. I show you these envelopes, four of them, and ask you if the bank sent them out? A. The bank did send these out to Arnold Berendson.

Q. Did you get them returned with the notation on these envelopes? A. Yes, sir, the post-office cannot find him.

Mr. Reis: I offer these four envelopes without the contents thereof as one exhibit.

Mr. Fennelly: May I see them?

Mr. Reis: Yes (handing to Mr. Fennelly). I am not offering the contents, Mr. Fennelly, unless you want them in.

Mr. Fennelly: I object to them. The witness has testified he made an effort to find him and did not.

The Court: Overruled.

Mr. Fennelly: Exception.

410

(Marked Government's Exhibit 26.)

Q. I show you a letter, Government's Exhibit 15, and ask you if that was brought to your bank on or about the date thereon set forth?

Mr. Fennelly: What is the exhibit number?

The Witness: 15.

Mr. Reis: Exhibit 15.

Mr. Fennelly: I thought you said 51.

Mr. Reis: No. That is not in evidence.

Mr. Fennelly: It has not any number?

Mr. Reis: No.

411

Q. I show you this letter dated February 5, 1937, and ask you if you have seen that letter? A. Yes, sir.

Q. On what date? A. On or about February 6, 1937.

Mr. Reis: I offer this letter in evidence. Off the record.

(Discussion off the record.)

Mr. Fennelly: The general objection, your Honor.

The Court: Overruled.

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*David Schnapp—for Government—Direct*

Mr. Fennelly: Exception.

(Marked Government's Exhibit 27.)

Q. I show you this envelope with the letter contained therein and ask you if the bank received this envelope and letter? A. Yes, sir, the bank did.

The Court: What is the date?

The Witness: The letter is dated February 9, 1937.

413

Mr. Reis: I offer the envelope and the letter as one exhibit (handing Mr. Fennelly).

Mr. Fennelly: The general objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 28.)

The Court: I think you may read it to the jury.

(Mr. Reis reads Exhibit 28 to the jury.)

Q. Did you ever pay out that amount of money, \$2,500?

A. No, sir.

414 Q. Did Berendson appear personally and make demand upon you or anybody in the bank for the \$2,500? A. I could not really say.

The Court: How about you?

The Witness: Me personally, no, sir.

Q. Was there a stop payment order on that check? Do you know (handing to witness)? A. No, sir.

Q. In so far as your bank was concerned? A. That is right.

Q. I show you a transcript of account and ask you what this is? A. This is the ledger sheet in the name of Arnold

Berendson, showing the deposit and showing the deduction for the original deposit.

Q. What do you mean by "deduction"? A. We deducted the money and set it aside.

Mr. Reis: We offer this copy of the transcript of account in evidence.

Mr. Fennelly: Not the original?

Q. This was furnished to this office by the bank? A. Yes.

Q. The records of the bank? A. Yes.

Q. Kept in the ordinary course of business? A. Yes.

Mr. Fennelly: Will your Honor inquire whether this is an original paper?

The Court: Is that the original?

The Witness: Yes, sir, it is.

Mr. Fennelly: There are some pencil notations on it which ought to be erased.

The Court: I do not know. Let me see.

Mr. Reis: It has got the word "Refer" on there.

The Court: The word what?

The Witness: This is put on simply for the benefit of the bookkeeper to remind her not to pay out any funds—

The Court: It will be received.

Mr. Fennelly: Same objection, your Honor.

The Court: Yes.

(Marked Government's Exhibit 29.)

Q. I show you this slip of paper and ask you to tell the Court and jury what it is? A. That is a regular form, advising Arnold Berendson that we are holding up the check of \$2,500 which he made, marked "Personal endorsement of the payee required."

418

*David Schnapp—for Government—Cross*

Q. Was this sent to Berendson? A. Yes, sir, it was.

Q. And was it returned to you? A. Yes.

Q. Because the addressee was unknown? A. Yes.

Mr. Fennelly: I wish you would let the witness testify whether it was returned to him.

Mr. Fennelly: The general objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 30.)

419

*Cross examination by Mr. Fennelly:*

Q. Did you open this Berendson Checkmaster account?

A. No, sir.

Q. Can you tell us by looking at the signature card, Government's Exhibit 23, who did, in your bank? A. No, sir, I cannot tell that.

Q. Will you tell me what this which looks like a bank stamp on the front of that indicates? A. It is a "2." Three sides of the cards may be stamped, 1, 2, 3, for different dates.

Q. A depositor who opens an account signs three signature cards? A. Yes, sir.

Q. This is No. 2 card? A. Yes.

Q. Does the card have any initial of an employee of the bank showing who it was that opened the account? A. At that time I do not believe that they required that.

Q. Do you know? A. I could not say definitely.

Q. Where is the No. 1 card? A. I could not say.

Q. Is it at the bank? A. It might be.

Q. And that might have an initial on that of some employee of the bank who opened that account? A. It might.

Q. I believe you testified that you received at the bank, the National Safety Bank, this check, Government's Ex-

420



*David Schnapp—for Government—Cross*

421

hibit 7, from Hart Smith & Company to someone named Arnold Berendson for \$2,500, is that right? A. Yes.

Q. How long was that held in the bank, do you know, after the date you received it? A. Offhand I could not tell you, because of the investigation that we conducted on it.

Q. The check was held? A. Yes.

Q. That was not returned to Berendson? A. No, sir, we did not.

Q. Or anyone else? A. No.

Mr. Fennelly: Mr. Reis, have you Exhibit 20 there? 422

Mr. Reis: Will you tell me what Exhibit 20 is?

The Clerk: The deposit ticket with reference to Exhibit 19.

Mr. Reis: Here is the deposit ticket (handing).

Q. Would you look at Exhibit 20 and tell me, if in response to a question of Mr. Reis, if you did not say that was a copy that you had made up at the bank and sent down as requested—

Mr. Reis: I object to the form of the question. 423

The Court: What did you say about it, then?

The Witness: I believe that is the date of the original, sir.

Q. Do you know? A. No, I could not say definitely.

Q. Isn't it a carbon? A. It may be a carbon.

Q. Look at it. A. It is a carbon on the typewriter, it may have been brought in for us by the customer.

Q. Do you know whether or not it is an original record of your bank? A. It looks like it is the original, yes. It has a teller's stamp on it.

424

*David Schnapp—for Government—Redirect*

Q. Now the Checkmaster system is one that has been in existence in your bank how long? A. Since June 1935.

Q. You have many accounts under the Checkmaster system? A. Yes, sir, we do.

Q. From your knowledge of banking in the city, that is the type of account which exists in practically all the banks, national and state? A. Yes, sir.

Q. All of the big banks? A. Yes, sir, that is correct.

Mr. Fennelly: That is all.

425

Mr. Reis: Just one question.

*Redirect examination by Mr. Reis:*

Q. I show you this check signed by Arnold Berendson, dated February 10, 1937, to Manning & Company, for \$2,500, and ask you if this check was presented to your bank for payment? A. Yes, sir, it was.

Q. Was that document attached to that check by your bank? A. Yes, sir.

426

Mr. Reis: I offer this in evidence as one exhibit, a check and the document attached thereto.

Mr. Fennelly: Same general objection.

The Court: Overruled.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 31.)

(Witness excused.)

*Olof Magnus Manning—for Government—Direct.*

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OLOF MAGNUS MANNING, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Captain Manning, what is your business? A. I am a shipmaster.

Q. What was your business in 1937? A. In the brokerage business.

Q. Where? A. At 80 Wall Street, New York.

Q. How long had you been in the brokerage business; how long had you been in 1937? A. About seven years. 428

Q. Prior thereto what was your occupation? A. A shipmaster for fourteen years, in the United States Government service.

The Court: Lead him to the point of objection.

Q. Were you a member of the New York Stock Exchange in 1937, in January or February? A. No.

Q. The Curb Exchange? A. No.

Q. Were you affiliated with any exchange? A. Not at that time, no.

Q. Do you know one Herbert Jacobson? A. Yes. 429

Q. I show you this picture. A. Yes.

Q. Who is that? A. That is Jacobson.

Q. What about this one—both of these pictures, who are they? A. Well, it is Jacobson.

Q. Was Jacobson associated with you in your place of business at that time? A. He had office space there.

Q. How long had he been there? A. He was there for six months altogether.

Q. What? A. Six months.

Q. Did he have a title?

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*Olof Magnus Manning—for Government—Direct*

Mr. Fennelly: Did he say that was 1937? I did not hear him.

Q. Was that 1937? A. 1936 and 1937, I think.

Q. Was he there in January and February of 1937?

A. I believe he left in the middle of the year.

Q. 1937? A. 1937.

Q. He had space in the office in January and February, 1937? A. Yes.

431 Q. Wasn't he vice-president of your company? A. He did have a little title, but he was not active in any way.

The Court: What company was that?

The Witness: Manning & Company, Incorporated.

Q. Do you recall Mr. Jacobson having a conversation with you as regards a certain transaction with Hart Smith & Company? A. Hart Smith & Company?

Q. Yes. A. I cannot remember the names.

Q. How old are you, Captain? A. Sixty-five.

The Court: I do not think he heard your question.

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Q. Do you recall having a conversation with Herbert Jacobson in January or February of 1937 with reference to a certain deal pertaining to Hart Smith & Company of some bonds? A. No conversation.

Q. What? A. No, no conversation.

Q. What took place?

The Court: What was the talk?

A. He brought a man into my office and asked if I could handle a deal, a bond deal. I said "Yes, we can handle any kind of a deal."

The Court: When was that, Captain?

The Witness: 1937.

Q. Was it around January or February? A. I believe it was.

Q. Just look at this envelope and see if that refreshes your recollection, and look at the date of the photostatic copy of the receipt for the registered letter and refresh your recollection as to about when you had that conversation with Jacobson. A. This is the time when Jacobson brought this man into my office.

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The Court: When was it?

Q. Was it at the time that the envelope was received or a couple of days before? A. Just a couple of days before.

The Court: When was it? What date?

Mr. Reis: This is dated February 11, 1937, received.

Q. Does that refresh your recollection? A. It would be about February 10th.

Q. Around February 10? A. Yes.

Q. Jacobson brought some man into your office? A. Yes.

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Q. What was the conversation between Mr. Jacobson and that man? A. There was no conversation with Jacobson. He said, "Can you handle a bond deal?" I said, "Yes, we can. We can handle any kind of securities."

Q. Who did you say that to? A. Jacobson and this man.

Q. Could you identify this man if you saw him? A. I believe if I saw him, but I only saw him for about three or four minutes.

Q. I show you Government's Exhibit 5 and ask you if you can identify that man? A. No.



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Q. You can not? A. No, I can not.

Mr. Reis: Government's Exhibit 5 is Peter Burns' photograph.

Q. After you had that conversation with Jacobson and that man, whom you cannot identify, you say you talked to that man for about three minutes? A. About three or four minutes.

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Q. Did you take care of the transaction or did you have a conversation with Jacobson? A. No, I told him that we could take care of it, and later on in the afternoon three copies of letters were prepared, which was necessary.

Q. Have you got them? A. Yes.

Q. Getting back to the conversation on the morning when you first met Jacobson with this man—

Mr. Fennelly: I would like to make an objection to this line of inquiry as not being competent.

The Court: Don't you think it might be considered?

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Q. What was the conversation with Jacobson and this man? A. The conversation was about the brokerage fee, and I told him that the usual brokerage fee would be somewhere about \$12.50 for handling the bond.

Q. What kind of a bond was it? Do you recall? A. No, it was just a bond, I think.

Q. Let me show you these last Government's Exhibits, 12, 14 and 15, and ask you if you saw those three letters?

The Clerk: Those are the wrong numbers.

Q. Exhibits 12 and 27. Are those two of the letters? A. Yes, those are the two letters.

Q. Now I show you this letter dated February 6, and ask you if that is the third letter? A. Yes.

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Mr. Reis: I offer this letter in evidence. It is addressed to Manning & Company (handing Mr. Fennelly).

Mr. Fennelly: This letter is in evidence.

Mr. Reis: No, that is the last trial.

Mr. Fennelly: Oh!

The Court: What date is it?

The Witness: I refreshed my recollection. It was February 5th, I believe, that this man was brought in, and on February 10th—

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Q. February 5th? A. February 5th.

Q. This letter of February 6, would that refresh your recollection? A. Yes, it does.

Mr. Reis: Will you mark this letter in evidence, please?

Mr. Fennelly: A general objection.

The Witness: February 6th, your Honor?

The Court: February 6th.

● The Witness: It was in the afternoon that these letters were presented, the same afternoon.

(Marked Government's Exhibit 32.)

441.

The Witness: The 5th or the 6th. I remember now about Hart Smith & Company more clearly. It has been six years ago.

Q. Is your memory refreshed that it pertained to 10 Minnesota & Ontario Paper Gold Notes, the conversation you had with Jacobson and the other man? A. Well, the conversation was just about a bond. I cannot remember the name of the company.

Q. Look at this letter, Government's Exhibit 32. Does that refresh your recollection as to the conversation, as

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to what the bonds were when you spoke to Jacobson and the other unknown man? A. Yes, this refreshes my recollection.

The Court: What bonds were they? Give the name of the company.

The Witness: It is mentioned in the letter.

The Court: Look at it and tell us what it is.

The Witness: \$10,000 bonds of the Minnesota & Ontario Paper Company.

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Q. Did you do anything on the afternoon of February 6, after you received these three letters, Government's Exhibits 12, 27 and 32? Those are the three letters. Did you do anything? A. Yes. I received a telephone call from Hart Smith & Company. When I received this telephone call, I called Mr. Jacobson and let him speak to them. I did not speak to them myself.

Q. Did Jacobson have a conversation with you about what he did with Hart Smith & Company? A. Well, I had these three letters and took the matter in hand and I sent a messenger up with what I had received.

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Q. What you had? What did you have? A. Well, at that time we had the letters, these three letters.

Q. Did you send somebody—

Mr. Fennelly: I have an objection to the entire line as not involving my client?

The Court: Yes.

Mr. Fennelly: Exception.

The Court: Yes.

Q. Did you send somebody up to the National Safety Bank from your office? A. Yes, afterwards.

Q. Let me show you this envelope again with the registered receipt. A. Yes.

Q. I ask you if it was after February 11th that you sent somebody to the bank? A. Well, I cannot remember the date, your Honor.

Q. Let's see if we can straighten this thing out: You sent Jacobson to Hart Smith & Company, didn't you? A. Yes, I believe he went there to interview these people.

Q. After he came back to you, what did you do? A. I believe I sent a messenger up.

Q. To the bank? A. To the bank, yes, and they refused to—

Q. Did you send a messenger to the bank with this check (handing witness)? A. Yes. 446

The Court: What exhibit?

Q. It is Government's Exhibit 31? A. Yes.

Q. He brought that check to you? Let's see if I can refresh your memory. Do you remember receiving this envelope? A. Yes.

The Court: What is the envelope?

Mr. Reis: Addressed to Manning & Company, 80 Wall Street, New York City, New York, marked "Special Delivery."

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Q. Did you sign a registry receipt for it? A. Yes.

Q. Is this a photostatic copy of the registry receipt that you signed? A. Yes, sir.

Mr. Reis: I offer the envelope and the photostatic copies furnished by the United States Post Office for the receipt of this envelope (handing Mr. Fennelly).

Mr. Fennelly: Same general objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 33.)

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*Olof Magnus Manning—for Government—Direct*

Q. Now, Captain, knowing that you received this envelope on February 11th, if I showed you the contents that were in it, could you remember them? A. Yes.

Q. Look at these documents and tell me if they refresh your memory as to the contents of this envelope, Government's Exhibit 33. Do you identify the checkbook? A. Yes.

Q. Government's Exhibit 25? A. Yes.

Q. You remember that? A. Yes.

Q. And Government's Exhibit 33, is that correct? A. Yes.

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Q. Look at the next exhibit. A. That is right. That key was on there.

Q. On the back, with the paper? A. That is right.

Q. You identify Government's Exhibit 24 and Government's Exhibit 33? A. Yes.

Q. Look at that letter (handing witness). A. Yes.

Q. That was in there? A. That was in there.

Mr. Reis: I ask that this be marked as a copy of the letter found in there, as an exhibit.

Mr. Fennelly: Same objection.

The Court: Same ruling.

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Mr. Fennelly: Exception.

(Marked Government's Exhibit 34.)

Q. I show you Government's Exhibit 31. Was this check—note the notation on it—the check in this envelope, Government's Exhibit 33? A. I remember this quite clearly.

Q. Now you remember the check? A. Yes.

Q. Did it come in this envelope? A. Yes, that is true.

Q. After you received this envelope with the contents which you have identified, what did you do on February 11, 1937? A. Then I sent a messenger up to the bank.



Q. What happened then? A. And they refused to honor the check. They said they wanted to see the person himself.

Q. Then what happened? A. When the messenger came back I was very much annoyed about it, and I goes up there myself to find out the reason why they would not honor this check. I waited there for a whole hour and had a talk with the vice-president, and he said they had reasons of their own.

Mr. Fennelly: I object to that.

Q. Do not go into the conversation you had with somebody in the bank. You went up to the bank? A. Yes.

Q. You came back to your office? A. Yes.

Q. Did you have a talk with Jacobson? A. Yes.

Q. What did you say to Jacobson? A. I said, "I won't handle this any more. You better get an attorney to handle this matter, because they won't honor the check. So therefore I refuse to go any further."

Q. You let Jacobson then take over? A. It was taken to a lawyer on the same floor.

Q. What was his name? A. Mr. Getz.

Q. You mean at 80 Wall Street, when you say the same floor? A. Yes. I think it was next door to Manning & Company's office that he had his office.

Q. From then on you had nothing to do with the transaction? A. No. I said I would not have anything to do with it.

Q. What did you say to Jacobson? A. I said, "I refuse to go any further. Let an attorney handle the whole case, because they refuse to honor the check. Therefore I refuse to go any further."

Mr. Reis: I wish to call attention to Exhibit 33 and Exhibit 28, both from the Bellevue-Stratford; Exhibit 33 the United States registry number—

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*Olof Magnus Manning—for Government—Cross.*  
*Herbert G. Jacobson—for Government—Direct*

Mr. Fennelly: I object. These exhibits speak for themselves.

The Court: He is calling attention to them.

Mr. Reis: On Exhibit 33 the registry number is 177734. It is to Manning & Company. The one to the bank is No. 177735, both from the Bellevue-Stratford Hotel.

Q. You never made any money on this transaction, did you? A. I never got one cent.

Mr. Reis: That is all.

*Cross examination by Mr. Fennelly:*

Q. Captain, you never saw this man sitting next to me in your life, did you? A. No.

Mr. Fennelly: That is all.

November 25, 1942.

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HERBERT G. JACOBSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Jacobson, are you admitted to the bar of the State of Ohio? A. I am.

Q. Were you ever convicted of any crime or offense? A. Yes, sir.

Q. What? A. In this court.

*Herbert G. Jacobson—For Government—Direct*

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Q. What were you convicted of? A. Mail fraud.

Q. When was that? A. 1939.

Q. Did you serve any time? A. Yes, sir.

Q. How long a period? A. Five months.

Q. Were you convicted of any other crime or offense?

A. Yes, sir.

Q. What? A. January of this year—

Q. You were one of the defendants named in this indictment, United States *v.* Turley, et al.? A. Yes, sir.

Q. This defendant did not stand trial with you at the time, did he? A. No.

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Mr. Fennelly: I object to that and move for the withdrawal of a juror.

The Court: As to form I sustain it. He was not on trial with you?

The Witness: No.

Mr. Fennelly: Exception.

Q. He was one of those named in the indictment with you? A. Yes, sir.

The Court: It is this indictment?

Mr. Reis: This indictment.

The Court: All right.

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Q. You stood trial, Mr. Jacobson, didn't you? A. Yes, sir.

Q. You were convicted? A. Yes, sir.

Q. You did not take the stand in your own behalf on that trial, did you? A. No, sir.

Q. You are not happy to testify in this case, are you? A. No, sir.

Q. Do you know the defendant Bollenbach? A. Yes, sir.

Q. How long have you known him? A. Oh, for the past year or two, I would say.

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*Herbert G. Jacobson—for Government—Direct*

Q. Do you know Peter Burns? A. Yes, sir.

Q. Is this Peter Burns, showing you Government's Exhibit 5? A. Yes, sir.

Q. How long did you know him? A. Since about 1936.

Q. Do you know George Turley? A. Yes.

Q. Is this his photograph (banding witness)? A. Yes, sir.

Mr. Reis: I offer this photograph in evidence.

Mr. Fennelly: I object to it; incompetent and immaterial.

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The Court:—Same ruling.

Mr. Fennelly: Exception.

(Marked Defendant's Exhibit 35.)

Q. Were you and Peter Burns and George Turley co-defendants and were you indicted in this indictment, the same indictment? A. Yes.

Q. By the way, what was your sentence?

Mr. Fennelly: I object to it.

The Court: Overruled.

Mr. Fennelly: Exception.

462 A. Sentence was suspended.

Q. And— A. Probation.

Q. How long? A. Ten years.

Q. How long did you know George Turley? A. Since the fall of 1936.

Q. Did you ever share space or use the facilities of George Turley's office? A. I do not understand the question.

Q. Did you ever use George Turley's office for space or use the space for the facilities of mailing and telephone messages? A. Occasionally.

Q. How long? What period of time? A. I was never regularly in his office.

Q. When did you first go up to Turley's office? A. In the fall of 1936.

Q. Did you ever see Peter Burns in Turley's office? A. Not that I recall.

Q. Did you ever see Chester Bollenbach in Turley's office? A. Not that I recall.

Q. Do you know Campbell Mason? A. Yes.

Q. I show you this photograph. Is this a photograph of Campbell Mason? A. Yes.

Mr. Reis: I offer this photograph in evidence.

Mr. Fennelly: I object as immaterial and irrelevant. 464

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 36.)

Q. Did you ever see Campbell Mason in Turley's office? A. Very frequently.

Q. Where was Turley's office located? A. He had several addresses.

Q. Give them to us? A. In 1936 he was located at 521 Fifth Avenue.

Q. In 1937? A. 521 Fifth Avenue. 465

Q. January and February? A. I think so.

Q. Going down to February of 1937, did you have occasion to receive a telephone call from George Turley, in the early part of 1937? A. Yes, sir.

Q. What was that telephone message?

Mr. Fennelly: Fix the time more definitely, if your Honor please.

The Court: Can you fix the time?

The Witness: I do not remember the exact date.

Q. Let me refresh your recollection by taking a look at Government's Exhibit 27, and tell me if that refreshes



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*Herbert G. Jacobson—for Government—Direct*

your recollection as to when you had a particular telephone call from George Turley? A. Yes, sir.

Q. When was it? A. Either on February 5 or February 6.

Q. What was the nature of that phone call? A. That he wanted to meet me at lunch.

Mr. Fennelly: I want to object, add to my objection, that it is understood in addition that this offense was subsequent to the time of the very crime or the date under the indictment, and the conspiracy had ended, in addition to having no connection with my defendant.

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The Court: Overruled.

Mr. Fennelly: Exception.

Q. What was the nature of the phone call? A. That he wanted to meet me, asked me whether I could leave my office and meet him in the Telephone Building at 195 Broadway.

Q. Did you meet Turley at the Telephone Building? A. Yes, sir.

Q. 195 Broadway? A. That is correct.

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Q. Did you meet him alone at that building? A. I think so.

Q. Did you have a conversation with George Turley there? A. He told me that two men were to meet him and we were going to have lunch.

Q. Is that all he said to you? A. I think so. I think the thing that he wanted at the time was to discuss it at the luncheon.

Q. Did you go to the restaurant? A. Yes, sir.

Q. Where did you go? A. I am not certain as to the restaurant. It was some place in the vicinity.

Q. Broadway? A. I think so.

Q. Was it Schwartz's? A. I think so.

Q. Whom did you meet there? A. I met Mr. Burns and another gentleman.

Q. Could you identify the other gentleman if you saw him? A. I do not think so.

Q. Look at the defendant Bollenbach. Was he there? A. I do not remember, sir.

Q. You do not remember? A. No, sir.

Q. You would not swear he was there or was not there, would you? A. No, sir.

Q. What was the conversation at that table between you, Turley and Burns and the man that you cannot identify?

A. I was told that the two gentlemen, Mr. Burns and the other gentleman—

Q. Was Burns introduced to you under the name of Burns? A. I knew Burns.

Q. Yes? A. I had bought lists from Burns in my brokerage business. I was told that they had made a deal up-State where they had taken stock securities in exchange for other securities; that the securities were brought to New York and sold to brokerage houses and the brokerage houses had issued a check.

Q. Were you told what the securities were? A. No, sir.

Q. Any discussion as to the name of the securities? A. No.

Q. At that conversation? A. At that time the question was how to cash the \$2,500 check.

Q. How to cash the \$2,500 check? A. Yes, sir.

Q. Were you told at the time of the conversation whose check it was? A. I was told that an Arnold Berendson had opened an account in, I believe, in the National Safety Bank on Fifth Avenue.

Q. Were you told who used the name of Berendson in opening that account? A. No, sir.

Q. Proceed. A. I was told that the stock securities were sold through Hart Smith & Company; that they had re-

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*Herbert G. Jacobson—for Government—Direct*

ceived a check from Hart Smith, and the check from Hart Smith was deposited in the National Safety Bank & Trust Company; that the Hart Smith check was drawn on the Chemical Bank, I believe.

Q. Before we go any further, do you recall testifying before the Grand Jury in this building on November 1, 1939? A. I do, sir.

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Q. Let me ask you if you stated to me that that conversation that was held was to the effect that you were going to meet a couple of men for luncheon and discuss a certain situation? A. That is correct.

Q. Is that correct? A. Yes.

Q. Do you remember Mr. Walsh questioning you before the Grand Jury? A. Vaguely.

Q. Vaguely:

Q. Coming down to February 1, 1937,"—

Mr. Fennelly: I object to it; no foundation laid. He asked him if he ever testified.

Mr. Reis: He said yes. I want to refresh his memory. He said that is all he spoke about with Turley. I am asking him if he testified—

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The Court: Have you told everything that you recall of the conversation?

The Witness: I think so.

The Court: All right.

The Witness: My testimony before the Grand Jury—

Mr. Fennelly: If it is for the purpose of refreshing his recollection, I think he should be allowed to see the testimony.

Mr. Reis: May I have your Honor declare that this witness is a hostile witness. He has made a statement that he is not happy to testify here.

The Court: First show him that testimony and see if it refreshes his recollection.

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Mr. Fennelly: I object to the remarks of counsel and move that they be stricken out.

The Court: The jury is going to decide the case, not on the statements of any counsel.

Mr. Fennelly: If Mr. Reis wants to testify, he may take the stand.

The Court: Show the witness the testimony before the Grand Jury and see if it refreshes his recollection.

Q. Read that question and read the answer (indicating).

A. I do not recall that, sir.

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Mr. Fennelly: May we have that marked for identification, if it please your Honor?

The Court: Yes, mark that for identification.

Mr. Reis: This question and this answer.

(Marked Government's Exhibit 37 for Identification.)

The Witness: May I read a question or two before that?

Q. Read the question or two before that. You may read the whole testimony, if you want to (handing witness).

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The Court: Having read it, does it refresh your recollection?

The Witness: Yes, it does, sir.

The Court: Now that your memory is refreshed, make the statement.

The Witness: In that testimony I testified that Mr. Turley had told me that certain bonds were taken in this trade transaction. In the statement I specifically state that certain bonds were taken.

Q. Mr. Turley had told you that certain bonds were taken? A. That is correct.

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Q. Do you recall what bonds were referred to, now that you have refreshed your recollection? A. I can; Minnesota & Ontario bonds. I think at the time I was asked whether those were the bonds, and I said I thought so.

Q. This was November 1, 1939, that you testified. A. In 1939.

Q. Before the Grand Jury? A. I never saw any bonds, nor did I see the check in payment of the bonds.

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Q. Now you tell us that the only talk in the restaurant was with reference to the \$2,500 Hart Smith check? A. No. At the time they told me that the Hart Smith check had been deposited in the National Safety Bank and that there was a credit in the National Safety Bank of that amount of money. They wanted the \$2,500 check presented to the National Safety Bank for payment, against that credit.

Q. Did they tell you that there was any trouble with the check? A. They said that a check had been deposited, some other check had been deposited, and that payment had been refused.

Q. Did they tell you why? A. They did not know why. They wanted me to find out why.

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Q. Did they tell you at the time that there was a typewritten endorsement on the check? A. Yes.

Q. Didn't they tell you that was the reason they were having trouble with the check? A. They said they thought it might be sufficient, and I believe at the time Mr. Turley said a typewritten endorsement was sufficient.

Q. Why did you say, when I asked you if there was a question about the endorsement, why did you state there was no question about it?

Mr. Fennelly: I object.

The Court: Overruled.

Mr. Fennelly: Exception.



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A. I did not mean to say that. I specifically remember the statement about the typewritten endorsement.

Q. Do you remember Mr. Fennelly being in my office a couple of months ago? A. Yes.

Q. And my questioning you in Mr. Fennelly's presence as to whether or not you knew Bollenbach and you said no, that you did not know whether or not he was the man in Schwartz's restaurant at the time.

The Court: You have two questions there. Separate them.

Mr. Reis: I will separate them. 482

Q. Do you recall whether I asked if Bollenbach was the man in Schwartz's restaurant when you were there with Turley and Peter Burns? A. Yes.

Mr. Fennelly: I submit that he should let the witness answer.

Q. What was the answer? A. I told you I did not remember.

Q. Look at this question and answer before the Grand Jury and see if it refreshes your recollection? A. I did testify that it was Mr. Bollenbach, in this— 483

Q. That is November 1, 1939, and you did testify before the Grand Jury that it was Mr. Bollenbach? A. That is right.

*By the Court:*

Q. That was where? In the restaurant? A. At that time.

Q. Was that testimony you gave before the Grand Jury true? A. To the best of my recollection it was true.

Q. Is that the best answer you can give as to whether your testimony was true or not? A. At the time the real

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understanding of the statement of Mr. Reis, his entire statement should be read.

Q. Would you answer my question?

The Court: Read it, please.

(Record read.)

A. I think it is, sir.

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Mr. Fennelly: May we have the part of the testimony that the witness has refreshed his recollection from marked for identification again, your Honor?

The Court: You may look at it. It is here.

Mr. Reis: He has got it in the record on appeal. He knows what is in this record.

Mr. Fennelly: I do not know whether I do or not.

The Court: Mark it.

Mr. Reis: Mark this for identification.

(Marked Government's Exhibit 38 for Identification.)

486 *By Mr. Reis:*

Q. So that on November 1, 1939, when you testified before the Grand Jury in this building you did know that the other man was Bollenbach, in the restaurant?

Mr. Fennelly: I object to the form of the question.

The Court: Overruled.

Mr. Fennelly: Exception.

The Court: Answer it.

A. Yes, sir.

*Herbert G. Jacobson—for Government—Direct*

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Q. Now look at him. Is he the man who was in Schwartz's restaurant with Burns and Turley? A. I do not remember, sir.

Q. Can you give us any more of the conversation in Schwartz's restaurant? A. Yes, sir.

Q. Go ahead.

*By the Court:*

Q. The fact that you testified that he was the man before the Grand Jury, does that refresh your recollection or not? A. Definitely.

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Q. What? A. Yes, sir.

Q. Now that your memory is refreshed, you may testify.

A. Of course, I have been interrogated many times.

The Court: Just answer the question.

The Witness: As I recollect it was a question—at this meeting the problem was over—

Mr. Reis: I press the question.

The Court: Read the question.

Mr. Fennelly: I submit that the witness be allowed to explain.

The Court: He has not answered my question.

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Q. Now as your memory is refreshed by reading the Grand Jury minutes, what do you have to say? A. At that time my conversation was a conversation that took place at this meeting and was mostly with Mr. Turley. The other two gentlemen present were in agreement with what Mr. Turley had to say, as Mr. Turley had told me at the time that he was their attorney, that they were clients of his; that they had taken these securities in a trade deal for other securities in a transaction in up-State New York.

Mr. Reis: I still press the question, if your Honor please.

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Q. You are not answering my question. We are talking about the identity of the defendant. You say you knew the defendant was there, before the Grand Jury? A. That is right.

Q. Now you say that your memory is refreshed about that? A. Yes.

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Q. With your memory refreshed, what do you say as to whether it was the defendant on trial who was at the luncheon? A. Whether he was at the luncheon, I do not know. He was pointed out to me many times, and the photographs were shown to me on many occasions.

Q. However, you testified before the Grand Jury that it was the defendant? A. I did, sir.

Q. Is that testimony true or false? A. I think it was true.

*By Mr. Reis:*

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Q. What about the conversation at Schwartz's? Give us the sum of it? A. At the time Mr. Turley said that somebody—or that they wanted to withdraw \$2,500 from the National Safety Bank, or they wanted a return of the Hart Smith check from the Chemical Bank & Trust Company, or they wanted a return of the securities or the Hart Smith check.

At that time I was asked what I could do to help them out in the situation. I told them at that time that I was with Manning & Company at 80 Wall Street and that if they would prepare three letters, one to Hart Smith & Company, one to the Chemical Bank and one to the National Safety Bank, that I would ask Captain Manning—in addition to that they endorsed the check for \$2,500 to the National Safety Bank—and that I would ask Captain Manning to have his messenger present the check for payment or call upon Hart Smith or call upon the Chemical Bank, to accomplish one, if not the three purposes.

Q. Did Turley tell you in that conversation that he did not want the two gentlemen at the table to undertake to get back the securities or the check? A. No, sir.

Q. Read this question and answer and see if it refreshes your memory. Look at the top of that page (handing witness).

Mr. Fennelly: What page are you referring to?

Mr. Reis: The Grand Jury minutes.

Mr. Fennelly: What page is this?

The Court: Is it numbered?

The Witness: No. At the top of the third page? 494

Q. Top of the third page of this Grand Jury testimony.

A. It does, sir.

Q. Does that refresh your recollection as to what was said? A. Yes, sir.

Q. What was said? A. That the reason that they did not want to do those things, one gentleman had been in some difficulty with the Securities Office at a prior time, and that for that reason the receipt for the securities was given in the name of Berendson, and that was the reason they did not want to appear at the bank.

Q. Weren't you told at that luncheon that Burns used the name of Berendson? A. That Burns used the name of Berendson? 495

Q. Yes? A. I am not sure of that, sir.

Q. You testified a few minutes ago in answer to his Honor's question that your statements before the Grand Jury were truthful, isn't that correct? A. Yes, sir.

Q. I ask you to look at this defendant Bollenbach and tell this jury whether that is the gentleman you spoke to, before the Grand Jury on November 1, 1939? A. According to the record, it is.

Q. Not the record. I ask you to look at him. A. I am looking at him. I have.



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*Herbert G. Jacobson—for Governor—Direct*

Q. I am asking you to answer the question. You looked at him?

The Court: Go down there and look at him.

(Witness leaves witness stand and goes down into the courtroom.)

The Witness: I have seen him and examined him. I took his blood pressure in West Street in 1939. I did not even recognize him at the time, did not know he was connected in the case.

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Q. You testified November 1, 1939, that there was a Bollenbach. I ask you is this the man that was at the luncheon? Yes or no. A. I do not remember, sir.

Q. What commission were you to get to undertake to get either the bonds or the check back or the cash on these Minnesota & Ontario bonds? A. I was to get no commission. At the time Mr. Turley was supposed to invest \$10,000. in Herbert & Company, which was my company. At the time he asked me to do this as a favor for him.

Q. You are not admitted to the New York Bar, are you? A. No, sir.

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Q. As a matter of fact Herbert & Company was a company that you had with Campbell-Mason, that was subsequently indicted for mail fraud, wasn't it, and you were found guilty?

Mr. Fennelly: I object to the question.

The Court: Overruled.

Mr. Fennelly: Exception.

A. Herbert & Company, I was sole proprietor.

Mr. Fennelly: This is cross examination of this witness.

The Court: I do not know whether you are asking questions or not. I will rule on your objection.

Mr. Fennelly: Exception.

Q. You had previously put through some security deals for Mr. Turley, prior to this date?

Mr. Fennelly: I object to it.

The Court: Same ruling.

Mr. Fennelly: Exception.

A. Yes, sir.

Q. Harriet Low bonds, is that right? A. Yes.

Mr. Fennelly: I object specifically. If the District Attorney is doing this, he must first show that he has been surprised.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. After the luncheon at Schwartz's, what did you do?

A. I went back to attend to the business that I had that particular day. An appointment was made at that time. I believe Mr. Burns was to bring the letters and the check to the office later in the day.

Q. I show you these three Government's Exhibits, 27, 32 and 12, and ask you if those are the letters that Burns brought to your office? A. Yes, sir.

Q. Did you introduce him to Captain Manning at that time? A. Yes, sir.

Q. Under what name? A. I do not remember, sir.

Q. Didn't you introduce him under the name of Berendson? A. I may have.

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*Herbert G. Jacobson—for Government—Direct*

Q. See if I can refresh your memory on that, Mr. Jacobson. Read this.

Mr. Reis: I think it is page 6, Mr. Fennelly.

Q. (Continued) Read the top of this page (handing witness). A. I so testified.

Q. What did you testify? A. That I had introduced Mr. Burns to Captain Manning as Mr. Berendson.

Q. Is that your testimony now that your memory has been refreshed? A. Yes, sir.

503

Q. Getting back to the conversation at the restaurant, was there any conversation about a Checkmaster account being opened in the National Safety Bank? A. I believe so. In fact I know there was.

Q. What was that conversation? A. That an account had been opened in the National Safety Bank through the mail.

Q. Now I ask you to read this question and answer at the bottom of page 3 and see if it refreshes your memory (handing witness)? A. I do not know who I refer to when I say "he."

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Q. Read the question before that, please. A. That Burns had said he had opened the account in the National Safety Bank.

Q. Under what name? A. Under the name of Berendson.

Q. Burns said that to you at the dinner, is that correct? A. Yes, sir.

Q. That is according to the sworn testimony before the Grand Jury on November 1, 1939? A. Yes, sir.

Q. Is that your testimony now? A. Yes, sir.

Q. So when these three letters were brought to you, Government's Exhibits 27, 32 and 12, by Burns, you introduced him to Manning as Berendson? A. Yes, sir.

*Herbert G. Jacobson—for Government—Direct*

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Q. Although you knew his name had been Peter Burns at that time? A. That is correct.

Q. Was there a discussion about any alibis in case there was an investigation by any authorities, by the Attorney General, if there was an investigation about the \$2,500 check or the M & O bonds? A. I do not recall it, sir.

Q. What was said? A. That later in the day, I have forgotten the appointed time, it may have been 4:30, 5:00 or 5:30, Mr. Burns was to come to the Manning office and give me the letters and a check.

Q. Now after you received the letters, Exhibits 27, 32 and 12, what did you do? A. When he came to the office I took him in and introduced him to Manning.

Q. Then what happened?

Mr. Fennelly: Would you show him the check? That is Mr. Burns, for the record.

The Court: Yes.

The Witness: Yes.

A. I made the introduction, told him what the situation was; told him they either wanted the securities back from Hart Smith & Company or they wanted a return of the check, the Hart Smith check, from the Chemical Bank, or they wanted the \$2,500 from the National Safety Bank in that account.

Q. Then what happened? A. The following day—

Q. To refresh your recollection as to the date of this check, tell us what it is (handing witness)? A. February

6.

Q. Then what happened? A. Manning was to attend to it. That is all that happened that day. The following day around eleven or twelve o'clock Manning sent for me. I went into his office, or his private office. He told me that Hart Smith was on the wire and would I talk to them.

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I got on the phone and Hart Smith said that they had these bonds; they had never dealt with Berendson before; that the transaction seemed to be irregular and they did not know anything about it and since they saw there was an irregularity in the transaction they had notified their surety company and the man from the surety company was in Hart Smith's office at that time, and would I come over and tell him what the facts were, which I did.

509 Either before or after this particular phone conversation with Hart Smith, Manning told me that he had presented the check to the bank for payment and the payment was refused and he had followed the instructions in these letters, through his messenger.

Q. What happened after that? A. I went over to Hart Smith & Company and told them about the situation. I said that Mr. Berendson had contacted Manning & Company for the purpose of getting his money or getting the bonds back or getting a return of the Hart Smith check.

Q. At the time you spoke to Hart Smith you knew Berendson was Burns, didn't you? A. Yes, sir.

510 Q. Go ahead. A. At that time I went back to the office and then later in the day I called Mr. Turley and told him what had taken place. There was some discussion as to what to do about it. I told him—

Mr. Fennelly: I renew my objection as incompetent, irrelevant and immaterial.

The Court: Same ruling.

Mr. Fennelly: Exception.

A. (Continued) I asked Manning to present these letters for payment or return of the securities or the check, and I felt bad that I had placed Manning in the predicament.

Q. Did you feel there was something wrong at the time when you spoke to Turley? A. I did, although I was assured that it was perfectly all right.



*Herbert G. Jacobson—for Government—Direct.*

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Prior to that I told him that Mr. Getz, who was an attorney, had an office at 80 Wall Street, next to Manning & Company, he might be able to do something about it. I said that I thought I ought to talk to him and see what steps he could take with regard to the situation; and I thought there would be no objection on the part of Manning if Getz were to represent him.

I then went into Getz's office and told Getz what the situation was. Getz said if we had a proper identification drawn up and a proper assignment—

Q. As a result of the Getz conversation there were certain legal papers drawn up, isn't that correct? A. That is correct.

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2:00 P. M.

HERBERT G. JACOBSON, resumed the stand.

*Direct examination resumed by Mr. Reis:*

Q. Did you pay the lawyer for drawing up these legal papers? A. Captain Manning paid him.

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Q. See if you can refresh your recollection on that, Mr. Jacobson. A. I remember getting a check from Captain Manning that I gave to Mr. Getz.

Q. Where did Manning get the \$50? A. I gave it to him.

Q. Where did you get it? A. I have forgotten whether I got it from Burns or Turley.

Q. Let me see if I can refresh your recollection. Look at the question and answer on this page; I think it is page 8 of the minutes. Read this page and see if it refreshes

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*Herbert G. Jacobson—for Government—Direct*

your recollection as to who you got the \$50 from (handing witness)? A. Mr. Burns.

Q. What is your answer as to who gave you the \$50 for paying Getz for drawing up these papers? A. Mr. Burns.

Q. As a matter of fact you went to the bank with Burns to get the \$50, didn't you? A. I think so.

Q. After you had a conversation with Turley? A. That is correct.

515 Q. Turley—I am referring to the one at 521 Fifth Avenue, is that correct? A. Yes, sir.

Q. Was anything done after you had Getz draw up the legal papers? A. I have forgotten now whether they were mailed or whether I gave them to Burns or Turley. I know one of those three things happened.

Q. But you did nothing further in trying to get the \$2,500 check or the bonds? A. No, sir.

Q. The Minnesota & Ontario bonds? A. Well, I sent the papers to them. At a later date I asked them whether or not—

516 Q. Asked who? A. Turley, whether or not the papers had been executed. He said they were, in fact, we had just time to carry both at that time.

Q. I show you these copies of legal documents and ask you if those are the copies that Mr. Getz drew up pursuant to your conversation with him? A. I think so.

Q. Look at them. A. I do not want to answer that.

Q. Is it or isn't it? A. I do not believe I ever read them.

Q. Did you ever see them? A. I did, yes.

Q. Look at them. You are a lawyer. Can you tell us whether those are the papers that Getz drew up? A. I am pretty sure those are the papers. In fact, I know they are. I remember I was told at that time that Berendson was in Chicago and the jurat was—

*Herbert G. Jacobson—for Government—Direct*

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Q. Who told you that Berendson was in Chicago? A. I think Turley did.

Q. You knew that Berendson was Burns, didn't you?

A. Yes, sir.

Q. And the statement about Burns being in Chicago was a statement that you made to Getz at that time, wasn't it? A. Yes.

Q. You knew Berendson was not in Chicago, didn't you?

A. By Berendson I meant the Berendson who signed the checks and opened the account, and so forth.

Q. In other words, you never told Mr. Getz you knew Peter W. Burns was Berendson, did you? A. No. I think I knew that Mr. Burns had not opened the account.

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Q. What account? A. The account in the National Safety Bank.

Q. You testified that Burns told you he did? A. If I did, it was incorrect.

Q. I will show you the Grand Jury minutes again. A. I know—

Q. We will come to it. Just minute, Mr. Jacobson. Read the bottom of that page, page 3, and the next page (handing witness), referring to the Grand Jury minutes of November 1, 1939. A. I am talking about the written signatures on the letters.

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Q. I am talking to you about your testimony that Burns told you at the restaurant that he had opened up an account at the National Safety Bank under the name of Berendson. Did you so testify? A. Yes, sir.

Q. So what you testified to was that you used the word "third party"? A. That was the situation.

Q. Read the testimony that you gave before the Grand Jury on November 1, 1939, where Mr. Walsh examined you. A. He told me Berendson or Burns told me he had opened a dollar account in the National Safety Bank.

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*Herbert G. Jacobson—for Government—Direct*

Mr. Fennelly: I object to the witness reading it. Let him read it to himself and see if it refreshes his recollection, and if it does, whether it was this defendant.

A. (Continued) He told me the account was opened under the name of Berendson.

Q. What did you testify there? You are reading it. What did you testify? Nothing as to what Burns told you about opening the account.

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Mr. Fennelly: I object to the form of the question.

The Court: Overruled.

Mr. Fennelly: Exception.

A. In this testimony I said that Burns opened an account under the name of Berendson.

Q. Was that testimony true on November 1, 1939, when you testified before the Grand Jury? A. Yes, sir.

Mr. Reis: I will have this portion marked for identification, Mr. Clerk, please. The bottom here and a part of the next page (indicating).

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(Marked Government's Exhibits 39 and 40 for Identification.)

Q. When you spoke to Mr. Getz with reference to getting up legal documents some time in February, 1937, and you told him that this Mr. Berendson was in Chicago, you knew for a fact that Berendson was not in Chicago?

A. I was referring to the Berendson whose signature is right on the documents.

Q. You knew Peter Burns as Berendson, didn't you?

A. That is correct.

*Herbert G. Jacobson—for Government—Direct*

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Q. Did anybody ever tell you that someone else signed the name of Berendson besides Burns? A. I was told—

Q. By whom? A. By Burns.

Q. Yes? A. That somebody else had signed the name of Arnold Berendson.

Q. Did Burns tell you why he had somebody else sign the name of Berendson? A. I do not remember.

Q. See if I can refresh your recollection. Did he tell you it was to create a confusion of identity?

Mr. Fennelly: I object to the question as leading.

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The Court: Overruled.

Mr. Fennelly: Exception.

A. I do not exactly remember.

Q. After Getz drew up the documents, did you give the originals to anyone? A. Yes.

Mr. Reis: At this time may I offer this in evidence?

Mr. Fennelly: May I see it?

Mr. Reis: As one exhibit (handing to Mr. Fennelly).

The Court: These are papers identified by the witness?

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Mr. Reis: Identified by the witness as having been drawn up by an attorney by the name of Getz.

Mr. Fennelly: Same general objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 41.)

Q. Mr. Jacobson, you gave the original of these documents to whom, did you say? A. Either Mr. Burns or Mr. Turley.



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Q. Did you have anything more to do with this transaction? A. No, sir.

Q. Shortly thereafter wasn't there a representative of the New York State Attorney General's Office who interviewed you? A. Yes.

Q. Sometime the latter part of February or the early part of March, 1937? A. I think it was six months afterwards.

Q. Did he ask you if you knew who Berendson was?

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Mr. Fennelly: I object to it.

The Court: Overruled.

Mr. Fennelly: It is not and could not be a part of the conspiracy—

A. I believe he did.

Mr. Fennelly: —on the element of time. Exception.

Q. What was your answer to that representative? A. I did not tell him.

Q. You did not tell him what? A. I told him I did not know who Berendson was.

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Q. At the time you knew Burns? You introduced Burns to Manning as Berendson, didn't you? A. Yes, sir.

Q. You knew who Peter Burns was at that time? A. Yes, sir.

Q. You did not tell the representative of the Attorney General's Office of the State of New York that you knew Peter Burns had used the name of Berendson, did you? A. No, sir.

Q. Do you remember a representative of the Federal Bureau of Investigation questioning you about this situation, talking about the M & O bonds and the Hart Smith deal, about Berendson? A. I think I was interrogated several times in regard to that.

*Herbert G. Jacobson—for Government—Direct*

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Q. When? Was it shortly after a representative of the Attorney General's Office spoke to you? A. No, prior to this.

Q. Your testimony before the Grand Jury? A. Yes.

Q. Did you tell the representative of the F. B. I.—

Mr. Fennelly: May we have the time fixed, first?

The Court: Fix the time.

A. I do not know the times that Mr. Reis is referring to.

Q. How many times were you interviewed by an agency or authorized investigatory body from the Attorney General's Office or the F. B. I. with reference to this matter before you testified you knew Berendson to be Burns? A. I think the Attorney General's Office investigation started November 9, 1937, and lasted up until sometime in 1937.

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Q. During that period of time were you questioned about Berendson, and did you tell anyone that you knew Peter Burns as Berendson? A. No, sir.

Mr. Fennelly: The same objection.

The Court: The same ruling.

Mr. Fennelly: Exception.

Q. Did somebody from the F. B. I. investigate you about this situation after the Attorney General's investigation had taken place? A. I think before that and after and during the time.

531

Q. What was your answer to the investigators of the Federal Bureau of Investigation?

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

A. I did not identify Mr. Burns as Berendson.

Q. Did you agree with Mr. Turley and Mr. Burns and the man that you cannot remember as to what explanation

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*Herbert G. Jacobson—for Government—Direct*

you would give in case anybody had asked you who Burns was?

The Court: Leave out the word "agree".

Q. Did you have a conversation? A. Not that I recall.

Q. Read this page 11 of the Grand Jury testimony on November 1, 1939, and see if it refreshes your recollection (handing witness). A. I answered "Yes" to the questions.

Q. What is the question? A. "That was part of a plan not to divulge who Berendson was, so they could not check up? A. Yes, sir."

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The Court: Was that answer true or false?

The Witness: It was true, sir.

Mr. Reis: I offer this portion for identification.

(Marked Government's Exhibit 42 for Identification.)

Q. I show you a letter dated February 10, 1937, and ask you if you ever saw this letter? A. I believe I did, sir.

Mr. Reis: I offer this letter in evidence.

The Court: Where did you see it?

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The Witness: In Manning's office. I think Manning called me in at the time and showed me the letter; together with the account book, and I believe there was a key and something else that came with it.

Q. While they are looking at that exhibit I have offered, I show you Government's Exhibits 33, 34, 7, 31, 24 and 25, and ask you if you have seen those exhibits?

Mr. Fennelly: Same general objection to this, your Honor.

The Court: Overruled.

Mr. Fennelly: Exception. I would like to have the ink notation on the top of it removed.

*Herbert G. Jacobson—for Government—Direct*

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The Court: All right. Received.

(Marked Government's Exhibit 43.)

The Court: Put something over the ink notation. It is not of much importance either way.

Q. You say you identify Exhibit 7. Where did you see Exhibit 7? A. That was a mistake. I never saw this.

Q. That is the \$2,500 Hart Smith check. You never saw that check? A. No, sir.

Q. State why that letter was written, if you know? A. I do not know.

536

Q. Wasn't it for the purpose of setting up an alibi that Berendson had left town?

Mr. Fennelly: I object to it.

The Court: Overruled.

Mr. Fennelly: Exception.

A. I am not familiar with that phase of the situation at all.

Q. I call your attention again to your testimony before the Grand Jury, which is— A. Three letters, yes, sir.

Q. I show you Government's Exhibit 42 for identification. Read that question and see if that letter does not refresh your memory as to the discussion as to Berendson leaving town? A. What part of it, Mr. Reis?

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Q. Right here (indicating).

Mr. Fennelly: What page, Mr. Reis, please?

Mr. Reis: Page 11.

The Witness: I think this refers to the other letters, doesn't it?

Q. Does it refresh your memory as to the testimony you gave? What is it about? A. "Plan not to divulge who Berendson was, so they could not check up." The answer was "Yes."

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*Herbert G. Jacobson—for Government—Direct*

Mr. Fennelly: I object.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. There was a plan not to divulge who Berendson was, is that correct? A. Yes, sir.

Q. Look at that letter, Government's Exhibit 43. Does that refresh your memory as to what the plan was, to cover up who Berendson was? A. I do not remember such a plan.

Q. You testified that there was such a plan on November 1, 1939, didn't you? A. This refers to November 6, not the letter of November 10.

Q. I show you a letter of November 6, three letters dated November 6.

The Court: Exhibits?

Q. Exhibits Nos. 12, 27 and 32. Do those letters refresh your memory as to the plan? A. Yes.

Q. What was the plan? A. The plan was to write those three letters.

Q. For what purpose? A. One to present to—

Q. I am not asking about presenting. What was the purpose of those three letters?

Mr. Fennelly: Objected to as calling for a conclusion.

The Court: What was said about it?

The Witness: The purpose was to either get—

The Court: What was said about it?

The Witness: To get the \$2,500 from the National Safety Bank or to get the securities back from Hart Smith & Company or to get the check of Hart Smith back from the Chemical Bank.

Q. Any other purpose? A. Not that I know of.



Q. Look at your testimony.

The Court: Anything else said? Use the word "said" instead of "purpose".

Q. Anything else said? A. Not that I know about.

Q. Read your testimony again and see if these letters refresh your memory as to what was said about Berendson not being in New York? A. I did not say that Berendson was not in New York.

Q. I am asking you now wasn't there a plan?

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Mr. Fennelly: He might not understand your question. Ask the witness to read the testimony before the Grand Jury and then look at the letters and tell you whether it refreshes his recollection or the letters refresh his recollection.

Q. As to whether or not an alibi was set up not to divulge— A. I have already said that there was not.

Q. When was there a talk about an alibi that Berendson was not in New York?

Mr. Fennelly: I object.

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A. I do not remember any talk.

Mr. Fennelly: I think if he would ask proper questions he would not have any trouble.

The Witness: These three letters were part of the plan of February 6th.

Q. Read the testimony. A. That was a part of the plan not to divulge who Berendson was, so he could not be checked up. My answer was "Yes, sir."

Q. What was the plan? A. The plan was to write three letters and bring them into the office later in the day.

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*Herbert G. Jacobson—for Government—Cross*

Q. What else? A. That is all.

Q. Was it to hide who Berendson was? A. No alibi.  
The letters were sent.

The Court: Won't you answer the question?

Read it.

(Question read.)

A. (Continued) I presume so. It was all part of the plan at that time.

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~~Mr.~~ Fennelly: I move to strike out what he presumes.

The Court: Leave out "presume." Was it?

The Witness: Yes, sir.

Mr. Reis: That is all.

Mr. Fennelly: May I have that testimony?

Mr. Reis: Yes (handing to Mr. Fennelly).

*Cross examination by Mr. Fennelly:*

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Q. Mr. Jacobson, Mr. Reis has inquired into the meeting where you were in his office and I was in his office some time, I think, this summer, he fixed the time. Before you went to Mr. Reis's office, had you received a letter from me requesting an interview? A. Yes, sir.

Q. Where I requested that I interview you about certain facts in this case? A. Yes, sir.

Q. Did you in response to that letter tell me and say that you did not want to see me until you first talked to Mr. Reis as to whether or not you should? A. I called you and told you that I had talked to Mr. Reis and Mr. Reis said it was perfectly all right to interview me, provided it was in his presence.

Q. I told you that that was satisfactory to me, did I not? A. Yes, sir.

Q. A time was fixed and you went to Mr. Reis's office and I went there, is that right? A. I do not know that any time was fixed. I received a phone call from Mr. Reis. I asked whether you were there. He asked me if I could come over at that time. I came over there.

Q. We did everything there in the same office with Mr. Reis, is that right? A. Yes.

Q. Up to that moment I had never spoken to you about this case, had I? A. No, sir.

Q. Didn't Mr. Reis or I ask you at that time who this other person was besides Burns in this restaurant at luncheon, who were at the meeting that you have described, where Mr. Turley and yourself and Burns were present? A. Yes, sir.

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Q. Didn't you tell Mr. Reis at that meeting that you did not know who the other man was? A. I have told Mr. Reis that on many occasions.

Q. At that occasion Mr. Reis told you that you testified to something else about Mr. Bollenbach, before the Grand Jury, is that right? A. Yes.

Q. Didn't you tell Mr. Reis that you did not know who it was when you testified before the Grand Jury, but that the government officials had told you that the other man was Mr. Bollenbach, and that you yourself did not remember who it was? A. Yes, sir.

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Q. Isn't that what you said on this occasion where I was present and Mr. Reis was present and you were present? A. That is correct.

Q. Now you did tell the government officials that you could—

Mr. Reis: Who are the government officials?

Mr. Fennelly: F. B. I. agents.

Q. (Continued)—that you did not remember who that man was, isn't that true? A. Yes, sir.

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*Herbert G. Jacobson—for Government—Cross*

Q. And the only knowledge that you had as to who this other person was when you testified before the Grand Jury was the name supplied to you by the Government officials as to who it was, isn't that right? A. Substantially so.

*By the Court:*

Q. You went before the Grand Jury and said the defendant was there, and to your own knowledge you did not know the defendant, is that your answer? A. No, sir.

551 Q. What do you mean? A. I mean that time—of course I was a prisoner. I was brought over, right. At that time I was, as I remember it, told them then—

*By Mr. Reis:*

Q. Told whom? A. Told Mr. Milenky and Mr. Walsh that I did not remember who the third man was, but I was showed pictures on many occasions.

Q. What? A. I was showed Mr. Bollenbach's picture on many occasions. I told you, I told Mr. Milenky, and I told Mr. Walsh and I told everybody else that I never knew Mr. Bollenbach, never had anything to do with him.

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The Court: Will you answer my question? Read it.

(Question read.)

The Witness: I do not think that I did that deliberately. I think the record, the testimony, would indicate that I did. At that time I told Mr. Milenky, I told Mr. Walsh—

Q. Is there a Mr. Keating? A. Mr. Keating may have been present. I told them that that was unwarranted, about Mr. Bollenbach.

*By the Court:*

Q. When you went before the Grand Jury you said the defendant Bollenbach was there, Bollenbach was there at the luncheon? A. I could only be guided—

Q. Did you say that? Yes or no? A. I do not remember saying it.

Q. If you said it, was it true or false? A. If I said it, it was false.

Q. Before the Grand Jury? Yes, sir.

The Court: All right.

*By Mr. Fennelly:*

Q. Let me see if I understand this correctly: Of your own knowledge you had no recollection as to who this fourth man was, is that correct? A. That is correct.

Q. But prior to your going to the Grand Jury some agents of the government had told you that this fourth person was Mr. Bollenbach, is that right? A. I had been told that on many occasions.

Q. But you had no recollection as to who the fourth man was at the time, and you so told the government agents when you went in there? A. That is right. I am not sure that this transpired between the time you are referring to and the time of the meeting in the restaurant.

Q. In this conversation at the restaurant there was some talk about some securities which had been taken in a switch, is that correct? A. Yes, sir.

Q. That is what you were told by Mr. Turley, was it, at that restaurant? A. That is correct.

Q. I think you started to testify this morning that sometime you had taken the blood pressure of Mr. Bollenbach? A. Yes, sir.

Q. When was that? A. That was when I was in the Federal House of Detention.



*Herbert G. Jacobson—for Government—Redirect*

Q. What time was it, what year? A. It was between June and November of 1939.

Q. Did you recognize him when you saw him then? A. No, sir.

The Court: Tell us about this blood pressure.

The Witness: At that time if anybody—if there was anyone arrested that came to the Federal House of Detention, I was attached to the hospital, and I used to take the blood pressure and fill out the admission cards, and so forth. At that time I examined Mr. Bollenbach and took his weight.

Q. You did not recognize him then? A. No, sir.

Mr. Fennelly: That is all.

*Redirect examination by Mr. Reis:*

Q. Do you remember making a statement to the F. B. I.?

A. Yes, sir.

Q. September 12, 1939? A. Right about that time.

Q. Was a stenographer present? A. Yes, sir.

Q. Mr. Milenky and Mr. Keating questioned you? A. Just Mr. Milenky.

Q. Was Mr. Keating present? A. I do not think so.

Q. You are not sure? A. That is correct.

The Court: What is that?

The Witness: Yes, sir.

Q. You are not sure? A. I am not sure.

Q. In your answer to Mr. Fennelly's question did you wish to imply that before the Grand Jury that you were influenced in saying Mr. Bollenbach, because Mr. Walsh and Mr. Keating and Mr. Milenky had been mentioning Mr. Bollenbach's name to you?

Mr. Fennelly: I object.

The Court: Overruled.

Mr. Fennelly: Exception.

A. I do not wish to make any implication.

Q. In answer to the Judge's question you answered that what you testified before the Grand Jury as regards Bollenbach was not the truth. Do you stand on that answer now? A. I do not know that I at any time ever intended to identify Bollenbach in that testimony there.

Q. Wait a minute. A. I did answer that question, yes, sir.

Q. You answered "Yes, sir," in answer to Mr. Walsh's questioning you, that it was Bollenbach? A. That is correct.

Q. Did Mr. Walsh influence you to testify that it was Bollenbach? A. I do not think anybody influenced me to testify that it was Bollenbach.

Q. That was November 1, 1939, that you testified to the fact that the other man in the restaurant was Bollenbach, besides Burns and Turley, is that correct? A. I do not know the exact date. I think it was.

Q. If I told you it was November 1st that you were before the Grand Jury, would you believe it? A. Yes, sir.

Q. Do you remember signing the pages of this statement made before the F. B. I.? A. Yes.

Q. Is that your signature? A. Yes.

Q. Did you read these papers before you signed them? A. I think so.

Q. Is this your handwriting, referring to your statement made on page 3, in this paragraph? Is that your handwriting (handing witness)? A. Yes, sir.

Q. Are those your initials annexed to the handwriting? A. Yes, sir.

Q. Read this statement and see if it refreshes your recollection as to what you told Mr. Keating and Mr.

Milenky, of the F. B. I., on September 12, 1939? A. That was prior to the Grand Jury?

Q. Yes. A. I said that I was not certain of the two gentlemen who might have been there. "I do not recall the restaurant now. I am inclined to believe that it was a restaurant where we walked up some steps and ate on a balcony. It was at the luncheon hour, and the place was quite crowded, and we were given a corner table in front of this restaurant. I was there a few minutes with Mr. Turley when two gentlemen came over and sat down." I wrote in handwriting, "This I am uncertain of: The two gentlemen might have been there. I do know the four of us sat down for lunch."

Q. Go ahead. A. "I was introduced to them. The two gentlemen in question were the two gentlemen who have been identified as Mr. Peter Burns, and this third photograph which is identified as Chester Bollenbach."

Q. You identified him then, didn't you, on September 12, 1939? Didn't you? A. Yes, sir.

*By the Court:*

Q. Was that statement true? A. Yes, sir.

Q. You mean that you did know Bollenbach? A. What is that?

Q. You did know Bollenbach. Yes or no? A. I thought I knew him.

Q. Did you know him or not? A. I never knew Bollenbach.

Q. You said that statement was true, didn't you? A. Yes.

Q. Is it? A. Yes, sir.

Q. If it is true, did you know Bollenbach? A. I knew him by the pictures there that they were showing to me.

Q. You meant that you had seen him? You had seen him? A. I had seen him in the court. I probably came to

*Herbert G. Jacobson—for Government—Redirect*

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court fifty different times for adjournments, went in and out.

Q. Is he the man that was in the restaurant? A. I am not sure of that, sir.

Q. Why did you say so in that statement? A. At that time I was in custody. At that time there was much duress and much influence and many things were happening, as far as I was concerned.

Q. Duress? A. Yes.

Q. You said that under duress? A. Yes, sir.

Q. Who exercised duress over you? A. That is not 566  
duress, but at the time a motion was pending for reduction of my sentence.

Q. Did anybody tell you to tell an untruth? A. No, sir, nobody told me.

Q. Was that the truth or was it false at the time you made it? A. I would say it was the truth.

Q. You did know Bollenbach? A. Yes—I knew him from the identification.

Q. That is not what you said. You said you were at the restaurant with him? A. Up until that time—

Q. You said you were at the restaurant with Bollenbach. Were you in the restaurant with Bollenbach? A. I think I 567  
was.

Q. You think you were? A. Yes.

(Record read.)

Q. What made you think so? A. I am not positive as to the identification and never have been.

Q. Were you positive when you testified before the Grand Jury? A. No, sir. Mr. Walsh and Mr. Milenky knew that at the time.

Q. Were you positive when you made that statement that the United States Attorney has been reading to you here, that you looked at to refresh your recollection? A.

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*Herbert G. Jacobson—for Government—Redirect*

No, sir, I have never been positive of Mr. Bollenbach's identification.

The Court: All right. Proceed.

*By Mr. Reis:*

Q. Let's get to that duress. This first statement was taken September 12, 1939, you told the jury. Look at your signature and tell us what date you signed that statement? A. September 12, 1939.

569

Q. Look at the last part. That is when it was taken. Tell us when you signed it? A. September 18, 1939.

Q. Look at the statement dated September 18, 1939, and tell us the date you signed this statement?

(Marked Government's Exhibit 44 for Identification; statement of September 18, 1939.)

Q. When did you sign it?

The Court: Is that marked?

Mr. Reis: I am going back to that statement that was marked for identification.

570

A. September 20th.

Mr. Reis: I offer this for identification.

(Marked Government's Exhibit 45 for Identification.)

Q. Did you complain to Mr. Walsh that there was duress used on you? A. I complained to you and Mr. Walsh.

Q. When did you first see me, Mr. Jacobson? A. Some time after my first case was over.



Q. Sometime in 1941 was the first you ever saw me, isn't it? A. I would say so. I know it was the time after all this had taken place.

*By the Court:*

Q. What is the definition of duress, as you used it? A. I did not mean to say duress. Duress was used wrongly. At that time I was expecting certain consideration to be shown me.

Q. What is the definition of duress, as you used it? A. Duress is force. 572

Q. Was any force used? A. No, sir, no physical force.

Q. Any kind of force? A. Yes, sir.

Q. What kind of force and by whom? A. By the FBI agents and the District Attorney, and at the time my wife and family were suffering. At that time I was led to believe, and very definitely, that certain conditions would happen if the statement was made.

Q. By whom?

*By Mr. Reis:*

Q. By whom? A. By Mr. Milenky, and at the time Mr. Milenky took me in to Mr. Foxworth, and the thing was very definitely understood. 573

Q. What was understood?

*By the Court:*

Q. Was it understood before Mr. Foxworth? A. Yes.

Q. What was understood before Mr. Foxworth? A. I had told exactly what had transpired in my first case, and I told my entire situation.

Q. What was understood before Mr. Foxworth? A. That I would be shown favorable consideration.

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*Herbert G. Jacobson—for Government—Redirect*

Q: For what? A. If I cooperated with the government and the FBI.

Q. And told the truth? A. I would definitely—

Q. And told the truth, I mean? A. Yes, sir.

Q. They did not ask you to say anything but the truth?

A. They never asked for anything but the truth.

*By Mr. Re:*

575

Q. What exactly did Mr. Foxworth say to you? A. I was brought in to him at that time. He wanted to know the entire situation. I reviewed the prosecution in the mail fraud case and what had transpired during the year and a half. I told him that I was—I felt that I should have been sentenced. I told him that my family was suffering, and told him that I was called in this matter. I told him what the situation was. I was told by Mr. Foxworth—they were the FBI, they were that department. I was told that they would cooperate and do all they could to help me in the matter.

*By Mr. Re's:*

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Q. What did he say? A. As I recall, he advised me to cooperate with Mr. Milenky in any possible way I could.

The Court: Did he tell you to say anything but the truth?

The Witness: No, sir.

Q. He told you to tell the truth, didn't he? A. Yes, sir.

Q. And the statements that you made were the truth?

A. Yes, sir.

Q. What you said before the Grand Jury was the truth, on November 1, 1939? A. Yes.

Q. What you told Mr. Milenky and Mr. Keating in your statement of September 12, 1939, Government's Exhibit

*Herbert G. Jacobson—for Government—Redirect:*

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44 for Identification, and September 18, 1939, Government's Exhibit 45 for Identification, was the truth? A. Yes, sir.

*By the Court:*

Q. That is, that you knew the defendant? A. That is what I testified to at that time.

Q. And that was the truth, you say? A. I put it in the statement, but at the time I told Mr. Milenky, I told Mr. Walsh, that I was not positive of Bollenbach's identification.

578

Q. Was it the truth when you testified to that fact before the Grand Jury? A. Yes.

Q. It is true now, isn't it? A. Yes, sir.

Q. What is true? A. That I identified Bollenbach in the statements.

Q. You testified before the Grand Jury you knew the defendant? A. That is right.

Q. Was that true or false? A. That is true.

Q. You did know him? A. Yes, sir.

Q. How long have you known him? A. I have known him since 1939.

579

*By Mr. Reis:*

Q. Did you testify that you met him in Schwartz's restaurant in February, 1937? A. Yes.

Q. How long had you known him, then? A. According to that I knew him since 1937.

Q. When did you know him from? A. I presume I knew him from 1937.

Q. Let's forget the word "presume." From when did you know him? A. I am positive I knew him from 1939.

Q. You did not know him from 1937? A. I do not think so.

580

*Herbert G. Jacobson—for Government—Redirect*

Q. So your testimony before the Grand Jury was not the truth? A. I thought it was at the time.

Q. Is it? A. I think so,

The Court: You think so what?

The Witness: That it was truthful. I think it is truthful.

Q. Mr. Jacobson, as a matter of fact you did not want to testify in this case unless I promised to cut your probation down, isn't that a fact? A. That is not so.

581

Q. Didn't I tell you I would have nothing to do with it; you were to tell the truth or suffer the consequences? A. That is not true. I did not attempt to bargain with you in any way, shape or form in this case.

Q. Didn't you come and say that you were sick and tired of reporting to the probation officer, and you wanted me to cut it down? A. I told you that.

Q. You did say that? A. Yes.

Q. Didn't I tell you I would not interfere with the sentence of the Court? A. Yes.

Q. Didn't you say to me that you did not want to testify unless I would help you, attempt to, if you testified?

582

A. No.

Mr. Fennelly: May we have the time fixed?

The Court: When was it?

The Witness: During the past week.

Q. My first question, I think, when I asked you if you were willing to testify in this case, and you said you were not happy about it? A. I said I was unhappy about it. You and Mr. Milenky asked me whether I was willing to testify in this case and I told you I would.

Q. Didn't you say you were not happy, you did not want to? A. I told you I was unhappy to testify in this case. I told you I preferred not to.

*Herbert G. Jacobson—for Government—Recross  
—Redirect*

583

Q. I want to get one thing: Before the Grand Jury, before you got your suspended sentence, is it your testimony that you were influenced to identify Bollenbach as the person you there knew by Mr. Walsh, Mr. Keating, Mr. Milenky or Mr. Foxworth? A. I do not think anyone influenced me to testify at any time.

Mr. Reis: That is all.

*Recross examination by Mr. Fennelly*

584

Q. Is it true that you told Mr. Milenky and Mr. Walsh, prior to making this statement, Exhibit 45 for Identification, that you were not sure of the identification of this fourth man who was in the restaurant? A. Yes.

Q. With yourself and Mr. Turley and Mr. Burns? A. Yes, sir.

Q. Did Keating or whoever it was that came there—didn't they tell you that it was Mr. Bollenbach? Isn't that true? A. Not exactly. At no time did they ever tell me that they wanted anything but the truth.

Q. But you told them that you were uncertain as to the fourth person there? A. That is correct.

585

Q. Before you went on the witness stand in this case did Mr. Reis go over your testimony with you? A. He started to, but then I was told that I was on probation and was obligated to tell the truth when I took the stand, and if I did not it would be a violation of my probation.

Mr. Fennelly: That is all.

*Redirect examination by Mr. Reis:*

Q. In other words, I started to question you about this situation in my office and after a few moments with you I stepped questioning you, didn't I? A. Yes, sir.



Q. Did I call your attention to the fact that one of the terms of your probation is to tell the truth at all times?

A. Yes, sir.

Q. You answered back to me "I refuse to be pushed around"? A. I told you I did not want to testify with a gun at my head; I did not want to be forced into any testimony. I told you if you called me as a witness, I would tell the truth.

Q. I did not spend much time with you in my office, did I? A. No, sir.

587 Q. I did not go over this testimony with you that we went through in court today, did I? A. No, sir.

Mr. Reis: That is all.

The Witness: May I be excused now? Can I leave the building now?

The Court: Wait outside awhile.

588 DAVID B. GETZ, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Getz, are you an attorney? A. Yes, sir.

Q. And admitted to practice in the State Courts of New York? A. Since 1904.

Q. Coming down to February of 1937, Mr. Getz, where was your office? A. At 80 Wall Street, New York.

Q. Do you know Manning & Company? A. I do.

Q. Do you know Captain Manning? A. Yes, sir.

Q. Do you know Herbert Jacobson? A. Yes, sir.

Q. I show you Government's Exhibit 41 and ask you if you can identify it?

The Court: What exhibit is that?

The Clerk: 41, your Honor.

A. Yes, sir, I can.

Q. Did you draw up those documents, Mr. Getz? A. Yes, those are the originals.

Q. Those are copies. Do you recognize them? A. Yes.

Q. Referring to Government's Exhibit 41, can you tell us under what circumstances you drew up those documents, to the best of your recollection? 590

Mr. Fennelly: Will the Court inquire of Mr. Getz if they are copies or the originals?

The Witness: Those are carbon copies. May I proceed?

Q. Yes. A. About February, 1937, Mr. Manning and Mr. Jacobson, of the firm of Manning & Company, called at my office, and after Mr. Jacobson introduced Mr. Manning—I did not know either of them personally—Mr. Jacobson did the talking. He told me that he had a case that he wanted me to handle. He said he had an office on the same floor with me, and that I should proceed with an action against the National Safety Bank & Trust Company to collect \$2500 on behalf of a client of theirs by the name of Berendson. 591

Mr. Fennelly: Same general objection.

The Court: Yes.

A. (Continued) He left the papers and was to pay a \$50 retainer, and I proceeded to take care of the matter. I went

over in person to the National Safety Bank and spoke to the manager, who told me—

Q. No conversation. You had a conversation at the bank? A. Yes.

Q. Then what did you do? A. I cannot state the conversation?

Q. No. A. Then I went back to my office and called in Mr. Jacobson and told him that the bank had refused to do anything unless I would start an action.

593 I told him that in order to start the action Manning & Company would have to have proper papers to clothe them with authority to bring such an action; and I told him that I thought an assignment of the claim which Berendson had against the National Safety Bank and also an assignment of the alternative claim which they would have against Hart Smith & Company, which Berendson would have against Hart Smith & Company, should be drawn up and signed by Mr. Berendson. After I would get these papers I would proceed with the alternative action either against the National Safety Bank or against Hart Smith & Company.

594 I prepared two sets of assignments. One was an assignment by Berendson to Manning & Company of his claim against the National Safety Bank to recover the deposit which he had there, and the other assignment—each one of these assignments was in triplicate—to clothe them with authority to bring the action against Hart Smith & Company to recover the bonds which they had sold in consideration of the check which was accepted.

I also instructed Mr. Jacobson that he should get the papers properly signed by Mr. Berendson and acknowledged by a notary public. Since he told me Berendson was a traveling man and would be in Chicago at the time—at least he thought he would be in Chicago at the time, to

prepare a memorandum of instructions to Mr. Berendson to scrutinize these papers, these papers setting forth in detail the manner of execution before a notary public, and also to have the notary's signature identified by the proper county clerk's certificates:

This I gave to Mr. Jacobson and he said that he would have them forwarded by others to him who knew his whereabouts, the whereabouts of Berendson, that he was traveling from town to town, and that he would have them sent first to Chicago, since he was traveling in the West.

About a week later Mr. Jacobson came to our office and said, "Well, I cannot do anything. Here are the papers. I cannot get Mr. Berendson to sign them. There is nothing further to be done about it." 596

That is all I know.

Q. Did you ever see the defendant Bollenbach? A. I do not know the man; never heard his name.

Q. Did you ever see Peter Burns? A. No, sir, I do not know who the man was. Never heard his name.

Q. I show you this Exhibit 5? A. No, sir, I do not know that man. Never saw him.

FRED BLASER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Blaser, did you plead guilty to the indictment charging you with the transportation or causing to be transported in interstate commerce Minnesota & Ontario Gold Notes? A. I did.

Q. Are you awaiting sentence? A. I am awaiting sentence.

Q. On this indictment in which this defendant Bollenbach is now on trial, is that correct? A. Yes, sir.

Q. Did you plead guilty to an indictment charging a similar offense with one Solly Seaman and others in March, 1941? A. Yes, sir.

Q. Are you awaiting sentence in that case? A. Yes, sir.

Q. Did you plead guilty to a violation of the Gold Standards Act of 1934? A. Yes, sir.

Q. What happened in that case? A. A suspended sentence.

Q. In the National Print Appliance case, were you indicted in that case with others? A. Yes, sir.

Q. What happened there? A. Suspended sentence.

Mr. Fennelly: May I have the time fixed for that, please?

Mr. Reis: Within the last year or so.

Mr. Fennelly: I would like the witness to say.

Q. Do you know when you pleaded guilty to that? A. March, 1942.

Q. Was that a post office case? A. Yes, sir.

Q. What is your occupation now, Mr. Blaser? A. I am working at the Todd Erie Basin Yard.

Q. How long have you been working there? A. Since early in the year 1941.

Q. What is your work there now? A. I am classed as a fire guard, but my duties are the waterlines, to take care of the waterlines.

Q. Where did you go to school? A. I graduated at public school here in New York and went over to Stevens Prep in Hoboken and had a year at the institute.

Q. Then what did you do? A. I was in business. I was with a silk association in New York until World War 1 and then I enlisted in the Air Corps.



Q. Were you in service? A. I was in active service.

Q. After you were mustered out of the army what did you do? A. I went down to Wall Street.

Q. What firms were you connected with? A. I was connected with Alfred R. Risse, Morton Lachenbruch & Company, Jerome R. Sullivan Company, Zimmerman & Forshay, M. S. Wien & Company and Gilbert Elliott & Company and General American Securities.

Q. Do you know George Turley? A. I do.

Q. I show you this Government's Exhibit 35. Is that Turley that you are talking about? A. Yes, sir.

602

Q. When did you first meet him? A. In the latter part of November, 1936.

Q. Where did you meet him? A. In my office.

Q. Where was your office? A. 32 Broadway.

Q. What was the name of the firm? A. Blaser & Ingalls.

Q. When was that firm started, organized? A. Started June of 1936.

Q. How much capital? A. We had \$500.

Q. Where were you located? A. 32 Broadway.

Q. What was the nature of your business? A. Over-the-counter securities.

603

Q. How long did that business continue? A. One year.

Q. Now you met George Turley in 1936? A. Yes, sir.

Q. October? A. The latter part of November, 1936.

Q. Down in your office? A. Yes, sir.

Q. What was the conversation? A. Turley came down to open up an account.

Mr. Fennelly: I object to this, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

Q. 1936. Go ahead. A. Turley came down to our office to open up an account. Ingalls introduced me to him,

604

*Fred Blaser—for Government—Direct*

Ingalls, my partner, introduced me to him. He sat down and endorsed a check, one for \$1200 and one for three hundred and some odd dollars.

Q. What was the conversation with Turley? A. He was opening up an account.

Mr. Fennelly: This is prior to the time charged in the indictment and any conspiracy on the part of the defendant.

The Court: What about it?

605

Mr. Reis: I want to show the association with Turley prior to this deal.

The Court: He said he was associated with him, had business relations with him.

The Witness: With Mr. Turley? Yes, sir.

Q. You kept a ledger with these transactions? A. Yes.

Q. And a blotter? A. Yes, sir. We had Turley's account: We were dealing actively for him.

Q. I thought you were trading for Turley, this firm of Blaser & Ingalls?

606

Mr. Fennelly: I object to it, if your Honor please, as incompetent.

The Court: Sustained.

Mr. Reis: May I come up to the bench with Mr. Fennelly a minute?

The Court: Yes.

(The following proceedings were had not in the presence of the jury:)

Mr. Reis: I want to show that the 15 bonds which are now going to be proven disposed of were disposed of through Blaser & Ingalls.

The Court: Which bonds?

Mr. Reis: The other 15 bonds were disposed of through Blaser & Ingalls. It was really through the defendant Turley, and Turley was responsible for getting them into the deal on behalf of Bollenbach.

The Court: What do you say to that?

Mr. Fennelly: I object to any testimony prior to the date alleged in the indictment where the charge may be conspiracy with him. He said he had nothing to do with it whatever. It is not so charged.

The Court: What date do you charge in the indictment?

Mr. Reis: January 1.

The Court: I think I will sustain the objection then.

Mr. Reis: All right. I did not draw the indictment.

The Court: All right.

(The following proceedings were had in the presence of the jury:)

Q. After January 1, 1937, outside of George Turley's account, did you have any other accounts? A. We did a little business; nothing much, though.

Q. Although the name of the firm was Blaser & Ingalls, he was a financial backer, wasn't he, of your firm? A. Yes, George Turley.

Mr. Fennelly: I object.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. After January 1, 1937? A. George Turley.

Q. I show you this picture, Government's Exhibit 36, and ask you who that is? A. Campbell Mason.

610

*Fred Blaser—for Government—Direct*

Q. Was he associated with you in your firm? A. Yes, he was.

Q. After January 1, 1937, was he associated with you in your firm? A. Yes, sir.

Q. Where had you seen him prior to January 1, 1937?

Mr. Fennelly: I object as immaterial.

The Court: Overruled.

Mr. Reis: I will connect it.

Mr. Fennelly: Exception.

611

A. At Turley's office.

Q. Where? A. 521 Fifth Avenue.

Q. What address? A. 521 Fifth Avenue.

Q. Did Blaser & Ingalls have a checking account after January 1, 1937? A. Yes.

Q. What bank? A. The Lawyers Trust Company.

Q. Who was authorized to sign checks? A. Myself, Ingalls and Campbell Mason.

Q. At whose request did you authorize Campbell Mason to sign the checks? A. At Mr. Turley's request.

Mr. Fennelly: I object to it.

The Court: This is after what date?

Mr. Fennelly: May I have a general objection, so I won't have to interrupt?

The Court: Yes.

Mr. Fennelly: Exception.

612

Q. I show you this letter dated January 19, 1937, and ask you if that is a letter to the bank? A. Yes, it is.

Mr. Reis: I offer it in evidence. There are certain notations on the side. All I care about is the date the money was received by the bank and the signature of Blaser & Ingalls.

*Fred Blaser—for Government—Direct*

513

The Court: All right.

Mr. Reis: If you want to block out anything, it is all right.

(Marked Government's Exhibit 46 and read to jury.)

Q. What did Mason have to do at your office after January 1, 1937, Blaser & Ingalls' office? A. He had his own little office with us and was handling all of Turley's business.

Q. These transactions with Turley, were they entered on the blotter and was his name on the ledger? A. Yes, sir. 614

Q. I show you this circular and ask you who got up this circular? A. Campbell Mason.

Q. Do you know when? A. Sometimes in January, January, 1937.

Mr. Reis: I offer the circular in evidence.

Mr. Fennelly: I object to it.

The Court: On what ground?

Mr. Fennelly: Irrelevant and immaterial.

The Court: What ground? On the general ground? 615

Mr. Fennelly: Irrelevant and immaterial.

The Court: Any evidence received is relevant and material.

Mr. Fennelly: Nothing to do with the case.

Mr. Reis: I will connect it up. I made a statement in my opening about the Rocky Mountain Fuel Company.

The Court: I will take it subject to a motion to strike.

Mr. Fennelly: Exception.



(Marked Government's Exhibit 47 and read to jury.)

Q. Prior to January 1, 1937, did you have occasion to visit George Turley at 521 Fifth Avenue? A. Yes, I think in December, 1936.

Q. Did you see Peter Burns there? A. No, I never did.

Q. Do you know Peter Burns? A. He came up to our office in March, I think it was, March, 1937. He came up to get some lists which Campbell Mason was using and he  
617 wanted to get them back.

Mr. Fennelly: I object to it and move to strike it out as subsequent—

Mr. Reis: No.

The Court: Denied.

Mr. Fennelly: Exception.

Q. I show you Government's Exhibit 5. Who is that?  
A. Peter Burns.

Q. Do you know Herbert Jacobson? A. Yes, I do.

Q. When did you first meet Herbert Jacobson? A. He  
618 was pointed out to me at Turley's office.

Q. When? A. I do not know if it was late 1936 or the early part of 1937.

Q. Who pointed him out to you? A. I think Ingalls.

Q. Dudley Ingalls? A. Yes.

Q. I show you this photograph. Who is it? A. This man I know as Herbert Jacobson.

Q. Government's Exhibit 11. Did you ever meet this gentleman, the defendant Bollenbach, in Turley's office prior to January or February, 1937? A. The first time I met him was in Turley's office the early part of February, 1937.

Q. Tell us under what circumstances you met this gentleman, indicating the defendant Bollenbach? A. Yes.

After receiving a telephone call from George Turley, both Ingalls and myself the early part of February, 1937 went up to Turley's office.

Q. Where? A. At 521 Fifth Avenue. We told the girl at the desk there that we had arrived and let Mr. Turley know. She did that and we were immediately ushered into his private office.

Mr. Fennelly: May we have the time fixed?

The Court: When was this?

The Witness: The early part of February, 1937, on or about the 5th of February, 1937.

620

Q. Go ahead. A. We came in and greeted Turley and we were introduced to this man here (indicating), as Mr. Brown. He said, "He has a proposition for you."

Q. Give us the conversation you had with Turley, Ingalls, yourself and this man who was introduced to you as Mr. Brown, indicating the defendant Bollenbach? A. He told us—

Q. When you say "he" mention names. A. Brown or Bollenbach, and he told us he had 15 bonds which had been taken in a real estate switch which he wanted to dispose of; were we in a position to dispose of them. He said if we can there is a good commission in it for us. He said in so far as the salesman who made this switch, we never saw him, but we have the name given us and the address where all of the confirmations pertaining to this trade could be sent.

621

The conversation with Brown lasted about fifteen minutes.

Q. Anything else said outside of the trading of the bonds? A. Just then he left us. He asked us could we cash a check for \$2,500 for him. He said the damn fool had endorsed it with a typewriter. I looked at him rather amazed. He wanted us to cash a check for him for \$2,500.

That part of the conversation was dropped and we had a walk out of Turley's office.

Q. Was anything else said at the conversation? Is your memory exhausted? Do you recall everything or will I have to refresh your memory?

The Court: Have you told everything that you recall?

The Witness: In fact this is almost six years ago.

623 Q. Was something said about a circular gotten up by your office? A. Oh, yes, he asked me—

Q. Who is "he"? A. Brown asked had we sent out any circular recently? I said we had sent out a circular and it was on the Rocky Mountain Fuel 5's.

Q. Is that the circular that you identified (handing witness)? A. Yes.

Q. Government's Exhibit 47, is that correct? A. Yes.

Q. Go ahead. A. He told me that we could use that circular with reference to this transaction.

624 Q. Go ahead. A. That the client for whom we sold the bonds is supposed to have received this circular and in answer to the circular he was to come down and make this switch. In other words, we were to sell these Minnesota & Ontario Paper Power gold notes in return for the purchase of the Rocky Mountain Fuel 5's.

Q. What is the meaning of the word "switch"? A. It is usually applied to the securities game where good securities are switched for securities—

Mr. Fennelly: I object unless they discussed it at the meeting.

The Court: Is that the meaning?

The Witness: Yes, your Honor.

Mr. Fennelly: Exception.

The Court: You may state what it means.

The Witness: Good securities are generally taken from a customer and securities of lesser value, or securities that are worth a less value, are given in exchange.

Q. Was there any talk about how much commission you would get at this conversation at Turley's office on or about February 5th if you put through this deal? A. Yes, with Mr. Turley.

Q. This Brown or Bollenbach left? A. That is right. 626

Q. Was there any conversation as to where the confirmation of sale was to take place or where you were to send the confirmation of sale? A. Brown told us in our conversation that he would give us the name and address where we were to send the confirmation.

Q. Did he give it to you on that date? A. No, he did not.

Q. Is that the conversation you had with Brown or Bollenbach, Ingalls, Turley and yourself? A. No, Ingalls and I had a conversation with Turley.

Q. I am talking about when Brown or Bollenbach was there. Have you given all of that? A. To the best of my knowledge. 627

Q. Was anything said about the market value of M. & O. bonds? A. I do not recall that.

Q. After Brown left the office did you and Ingalls and Turley have a conversation? A. Yes, we did.

Q. What was that conversation?

Mr. Fennelly: I object to it as incompetent.

The Court: The same ruling.

Mr. Fennelly: Exception.

Q. What was the conversation? A. I beg your pardon.

628

*Fred Blaser—for Government—Direct*

Mr. Fennelly: May I point out that I do not know whether right after Mr. Bollenbach left him that would be binding on him.

The Court: If he was in on it, it is binding.

Mr. Fennelly: I take an exception.

The Court: All right.

A. (Continuing) The first thing Turley said was to keep our hands off the check.

Q. What check? A. The check of \$2,500.

629

Q. Did he say something about it? A. He repeated that the check had been endorsed with a typewriter and the bank had refused payment. He says for us to keep our hands off.

Q. Did he say where the document was? A. He told us that it was issued by a Street house, drawn on the National Safety Bank.

Q. What other conversation did you have with Turley that day? A. Turley, as far as we were concerned in this transaction, said to set it up in our books and records in the regular course of business. When we disposed of the bonds to take the regular two-day interim to make delivery and pay the following day.

630

In other words, do everything according to Street practice.

Q. Were you licensed to deal by the Securities and Exchange Commission at the time? A. Yes, sir, we were licensed by the Securities and Exchange Commission.

Q. Was there any fixed rate that you were authorized to charge for the clearance of these bonds? A. There was no fixed rate. We were going to charge three-fourths of a point for the clearance.

Q. What were you to get for clearing these bonds? A. We were to get \$500.



**Fennelly:** Did someone say this to him, your Honor?

**The Court:** Did someone tell you that?

**The Witness:** Yes, George Turley.

**Q.** When did you see Brown or Bollenbach next after you left Turley's office? **A.** The following afternoon in our office, late in the afternoon.

**Q.** Did you have a conversation with him? **A.** Yes, he came into our private office and he told us that he would either have—either bring down the bonds the next day or have them sent down, and while he was there to give him the Rocky Mountain Fuel 5's circular, which I did. 632

**Q.** I show you Government's Exhibit 47. Is that a copy of the circular that you gave him? **A.** Yes, it is.

**Q.** When he was up at your office, Bollenbach, did you know him as Bollenbach then or still Brown? **A.** I only knew him as Brown.

**Q.** Outside of giving him the circulars, did you do anything else? **A.** That afternoon nothing, to the best of my knowledge.

**Q.** Did you make an inquiry about the market price that day? **A.** Not that day.

**Q.** When did you see him next? **A.** The next day, which was a Saturday, he came in just before the closing, that is, around noon. 633

**Q.** Yes. **A.** And he handed me the envelope which contained 15 bonds.

**Q.** What kind were they? **A.** Minnesota & Ontario Paper Power gold notes. He also gave me a letter of authorization.

**Q.** I show you this letter. Did he bring you this letter? **A.** Yes, sir.

**Mr. Reis:** I offer this letter in evidence.

**The Court:** What is the next exhibit number?

634

*Fred Blaser—for Government—Direct*

The Clerk: 48.

Mr. Fennelly: Objection. This is subsequent to the bringing of the bonds into New York by whoever brought them.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 48 and read to jury.)

635 Q. After he brought this letter to you, Government's Exhibit 48, did you make inquiry as to the market value of these securities? A. I did.

Q. Whom did you talk to? A. I called the firm of A. E. Ames & Company.

Q. Did you get a quotation? A. I did.

Q. Did you tell Bollenbach or Brown what quotation you received from Ames? A. Yes, 26 bid; 28 offered.

Q. Did you make the sale on that day? A. No, I did not. It was then after 12 o'clock, and I agreed with him that we ought to wait until Monday morning to dispose of the securities.

636 Q. What happened the next time? A. On Monday morning I disposed of the securities to A. E. Ames & Company.

Q. I show you these two books. Do you recognize them? A. Yes, sir.

Q. What are they? A. Our ledger and our blotter.

Q. Were they kept in the ordinary course of business by your firm? A. They were.

Q. Do these books reflect this transaction of the sale of 15 Minnesota & Ontario notes to A. E. Ames & Company? A. Yes, sir.

Q. Will you identify the pages? A. Over here (indicating).

Q. What date? A. February 8th they were sold.

Q. Does your blotter give the numbers that were sold?

A. Yes, sir.

Q. What numbers are they? A. 3480, 1025, 1024, 1023, 1022, 1021, 2901, 2950, 2006, 2007, 2900, 1189, 2888, 2062 and 2061.

Q. How much were they sold at? A. 10 were sold at 27½ and 5 at 26¾.

Q. Making a total of what? A. The dollar amount?

Q. Yes? A. \$4,050.

Q. Does your ledger reflect this transaction? A. Yes, sir.

638

The Court: What do you want to do with it?

Mr. Reis: I want to offer in evidence the number of changes referring to this transaction.

The Court: The blotter will be what?

The Clerk: 49.

The Witness: This is it in here, too (indicating).

The Court: What is this book?

The Witness: A ledger.

The Court: A ledger?

The Witness: Yes.

The Court: That will be 50?

The Clerk: That is right.

639

The Court: Pass them down to Mr. Fennelly.

Let him have the ledger.

Mr. Fennelly: The offer was not marked.

Mr. Reis: I offer this blotter as an exhibit.

The Court: The blotter will be No. 49.

Mr. Reis: I am also going to offer the ledger as an exhibit, Exhibit 50.

Mr. Fennelly: Same objection, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

Mr. Reis: Will you mark these, please? Mark

640

*Sophie Perl—for Government—Direct*

the pages pertaining to the deal, these sheets, as Exhibit 50 and this as Exhibit 49.

(Blotter marked Government's Exhibit 49; Letter marked Government's Exhibit 50.)

Q. After you made the trade on February 8th, did you notify anyone? A. Yes, we sent confirmation to Walter T. Roberts at the Hotel New Yorker.

641

SOPHIE PERL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Miss Perl, what is your occupation? A. I work for the Hotel New Yorker, supervisor in charge of guest history.

Q. I show you this document. Can you tell us what it is? A. It is a registration and the signature of Walter T. Roberts, registered February 8, 1937.

642

Q. When did Roberts go out? A. February 9, 1937.

Mr. Reis: I offer this in evidence.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 51.)

Q. I show you a letter dated April 29, 1937, and ask you if you know whose letter that is? A. Yes, signed by George B. Lilly, Treasurer and Manager of the Hotel New Yorker.

Q. You know his signature? A. Yes.

Q. That is his signature? A. Yes.

(Marked Government's Exhibit 52 for Identification.)

Mr. Reis: That is all, Miss Perl.

Mr. Fennelly: May I see Exhibit 51?

Mr. Reis: Here it is (handing to Mr. Fennelly).

*Cross examination by Mr. Fennelly:*

Q. On Exhibit 51 I call your attention to some initials under the word "Clerk." Will you tell me what the initials are? A. J. D. They stand for Jerry Duba, chief clerk at the hotel at the time.

Q. Is that the clerk who takes the registration of the guest when he comes to register? A. That is right.

Q. And at the time was— A. Room clerk.

Q. In the hotel? A. Yes.

The Court: Where is he?

The Witness: He is deceased.

Mr. Reis: He is where?

The Court: Deceased.

Q. Do you know whether Mr. Walter T. Roberts paid his bill? A. According to that he must have. 645

Q. Do you know whether or not it was paid by cash or check? A. No, I cannot tell from the registry.

Q. There is a number on here of a bellman. A. Bellman No. 37, who took him to his room.

Q. Do the records disclose who is No. 37? A. With the bell captain. The hotel has such records, I believe.

Q. The hotel has such records? A. I believe so.

(Witness excused.)



646

*Fred Blaser—for Government—Direct*

FRED BLASER, resumed the stand.

*Direct examination (continued) by Mr. Reis:*

Q. When you were told to set up the regular commission clearance on your sales book or blotter by Turley, was anything said about the possibility of an investigation about this transaction? A. Yes, he told us at the time that—

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

647

A. (Continued)—that there might be an investigation of this thing; there is nothing wrong with it, but he says there may be an investigation and to have everything set up the way you do in every trade.

Q. After you got in touch with Turley when you made the sale on February 8th or 9th, what did he say to you?

A. That night, that Monday night, after we made the transaction and sent out the confirmation, Ingalls and I went up to Turley's office. He had told us early in the day over the phone to bring up a blank check.

Q. Did you have a bank account in any bank? A. Yes, we did.

648

Q. Where? A. At the Underwriters Trust Company.

Q. I show you this check dated February 11, 1937. Disregard the writing on it. Was it a check on the Underwriters Trust Company that you and Ingalls brought up to Turley? A. Yes, sir.

Q. Was there anything written on the check, on the front or back when you brought it to Turley? A. It was a blank check.

Q. After you brought that blank check to Turley, what happened? A. That following day Bollenbach came down.

Q. Did you know him as Bollenbach then? A. No, I knew him as Brown.

Q. What happened? A. He came up and handed me the check back endorsed.

Q. Endorsed what? A. The signature of Walter T. Roberts.

Q. (Handing witness) Is that the signature? A. Yes.

Mr. Reis: I offer the check for identification just now.

(Marked Government's Exhibit 53 for Identification:)

Q. Did you receive a check from anyone for the sale of these 15 gold notes? A. Yes, we did. 650

Q. From whom? A. From W. H. Goodby, the clerk at Ames.

Q. Did you deposit the check? A. Yes.

Q. Where? A. Underwriters Trust.

Q. When did you deposit it, if you recall? A. We deposited it on February 10. That was the date we cleared the bonds.

Q. Yes. A. And we drew this check on February 11.

Q. Did you see Brown or Bollenbach on February 11?

A. Yes.

Q. Where? A. Down in my office. 651

Q. What happened? A. He came down around noon and we both went over to the bank, and the body of the check—

Q. Did anybody fill out the body of the check? A. Yes, Ingalls filled out the body of the check.

Q. For how much? A. \$3,937.50.

Q. What happened to the difference between what you got for the 15 notes and the amount of that check?

Mr. Fennelly: What check? May we have him refer to some check that we have discussed here?

Q. How much did you get for the sale of the bonds? A. \$3,050.

652

*Fred Blaser—for Government—Direct*

Q. Did you make any commissions on this trade? A. Three-fourths of a point, representing \$112.50.

Mr. Fennelly: I would like to find out what check it is that he is testifying about.

The Court: Get down to it.

Mr. Reis: I will get down to this.

Q. Now you have Government's Exhibit 51 for Identification? A. 53.

653

Q. That was the check that was brought to you with the letter of Roberts in blank without anything on it by Brown or Bollenbach, the defendant, after you went up to Turley's office with the blank check, is that right? A. That is right.

Q. Who filled in the body of this check, Government's Exhibit 53 for Identification? A. Ingalls.

Q. For how much? A. \$3,937.50.

Q. What did the amount reflect? A. The net amount due the customer, Walter T. Roberts.

Q. After what deductions? A. After the deduction of \$112.50 which was to pay our commissions.

654

Q. After this check was filled out, what happened? A. Brown and I went over to the bank to cash it.

Q. What bank? A. The Underwriters Trust Company.

Q. What happened? A. I had the check cashed for Brown.

Q. Did you endorse that check? A. I guaranteed the endorsement, signed it with the firm's signature.

Q. After you got the cash, what did you do? A. I took the money back to the office. Brown left me.

Mr. Reis: I offer this check in evidence, Government's Exhibit 53 for Identification (handing to Mr. Fennelly).

The Court: Did you take it back to the office?

*Fred Blaser—for Government—Direct*

655

The Witness: Yes, sir.

Mr. Fennelly: Is that the check he said he took uptown?

Mr. Reis: He says that is the blank check that was brought back by Brown or Bollenbach and signed "Walter T. Roberts."

Mr. Fennelly: Same objection.

The Court: The same ruling.

Mr. Fennelly: Exception.

(Government's Exhibit 58 for Identification now received in Evidence.)

656

Q. I notice a notation on the back of that check designating various amounts totalling \$3,937.23. Will you tell what that is? A. That is the bank teller's figures. The bills were given to us in different denominations.

Q. What denominations, do you recall now? A. I do not know. I know there were some \$100 bills, \$50's, \$20's; different denominations.

Q. After you cashed this check, Government's Exhibit 53, did Bollenbach or Brown, as you knew him, leave? A. Brown left me and I went back to the office.

Q. About what time of the day was it? A. Shortly after 12 o'clock. 657

Q. What did you do with the cash? A. I gave the cash to Ingalls and later on in the afternoon he went out.

Q. When Ingalls got back did he tell you where he was? A. Yes.

Q. Where did he tell you? A. He said to Turley's office with the money.

Mr. Fennelly: I object to that.

The Court: Overruled.

Mr. Fennelly: Exception.

658

*Fred Blaser—for Government—Direct*

Q. Did he tell you what took place at Turley's office?

A. Yes, he told me an incident that took place.

Q. What did he tell you?

Mr. Fennelly: I object to that.

The Court: Overruled.

Mr. Fennelly: That is not something in furtherance of it. This narrates the course of the events.

The Court: Overruled.

Mr. Fennelly: Exception.

659 A. As soon as he got to Turley's office—

Q. This is what Ingalls told you? A. Yes. When Miss Case saw him he told her to let Mr. Turley know he was there. She did that. The man was told to go into his private office. When he got there, as he got to the main office he saw an individual sitting there whom he recognized from the street. Ingalls went in—

Mr. Fennelly: May I take the liberty of enlarging on my motion and stating that it is pure hearsay and what happened is not in furtherance of anything.

660

The Court: Denied.

Mr. Fennelly: Exception.

The Court: Go ahead.

A. (Continued) Ingalls went in and handed Turley all the funds. Turley started to count out the stuff and placed the money—

Q. Did he tell you who was there with him? A. Yes, Brown was there, Turley and Ingalls. When he got through counting he put some of the money in the drawer and some in his pocket and he handed Ingalls \$400. Ingalls reached for it and got it and put it in his pocket. As he started for the door an individual walked in, the same individual that



he had recognized sitting in the outer office. At that moment this party reached over to George's desk and picked up a bundle of the money. Brown looked at him in amazement and says, "What the hell is this, Turley? Where do I come off?"

Mr. Fennelly: Still the conversation?

The Court: Yes.

A. (Continued) With that Ingalls was walking out of the office, because it was no concern of his, he came downtown.

662.

Q. After this trade took place was there any inquiry made by anybody about these gold notes of your firm? A. In the latter part of April, 1937, Mr. Howe, senior partner at A. E. Ames & Company,

Q. You had a talk with somebody at A. E. Ames & Company? A. Yes.

Q. Did you do anything? A. Yes, I went over to the office. A. E. Ames had closed that day.

Q. After you spoke to somebody at A. E. Ames & Company did you and Ingalls,—did you and Ingalls go over? A. No, I believe not.

Q. After you spoke to the A. E. Ames Company representative and they told you something, did you see somebody else? A. Yes.

663

Q. Who? A. Went up to George Turley's office.

Q. Whom did you go with? A. Ingalls.

Q. Where was that office at the time? A. 521 Fifth Avenue.

Q. When was that? A. The latter part of April, 1937.

Q. Did you have a conversation with Turley? A. Yes, sir, we did, both of us.

Q. What did you say to him? What did you tell Turley?

A. We told Turley that A. E. Ames & Company had informed us that the bonds had been stolen.

664

*Fred Blaser—for Government—Direct*

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

Q. What did you say to Turley and what did he say to you? A. We told Turley that Ames had informed us that the bonds had been stolen.

Q. What did Turley say to you? A. Turley flatly denied it.

665

Q. What did you do after that? A. We sent out letters and telegrams to the registrars, and to the payee of the check, and of these bonds.

Q. I show you a letter dated April 29, 1937. Was this produced by you at the office of the District Attorney? A. Yes, sir.

Mr. Reis: I offer this letter for identification.

(Marked Government's Exhibit 54 for Identification.)

Q. In response thereto did you receive this letter dated May 4, 1937? A. Yes, sir.

666

Mr. Reis: I now offer Exhibit 54 for Identification and this letter dated May 4, 1937, as Exhibit 55 in evidence.

Q. I show you a copy of a telegram, without a date, sent to the same bank, Northwestern Bank. Is that a copy of a telegram sent by your office? A. Yes, sir.

The Court: Are these papers from your files?

The Witness: Yes, sir.

Mr. Reis: I offer this telegram in evidence.

The Witness: We have one file on this entire transaction, your Honor.

Mr. Fennelly: I object as incompetent and no connection with Mr. Bollenbach.

The Court: The same ground, is it?

Mr. Fennelly: Yes; also beyond the time of any conspiracy.

Mr. Reis: The indictment reads up to January 1, 1938 (handing to the Court).

The Court: Overruled.

Mr. Fennelly: Exception.

(Government's Exhibit 54 for Identification now received in Evidence. Two other documents marked Government's Exhibits 55 and 56 and read to the jury by Mr. Reis.)

Q. Did you say that you had a conversation with somebody from A. E. Ames on the 29th of April? A. 29th of April.

Q. I show you a copy of a letter dated April 29th. Is this from your files? A. Yes, sir.

Q. Kept in the regular course of business? A. Yes.

Q. I show you a letter dated April 29th from the Hotel New Yorker. Was that received by your firm? A. That is right.

Q. In the regular course of business? A. Yes, sir.

Mr. Reis: I offer these two letters as one exhibit.

Mr. Fennelly: May I see them, please?

Mr. Reis: Yes (handing to Mr. Fennelly).

The Court: I think one was marked.

Mr. Reis: One was marked for identification.

The Court: As what?

Mr. Reis: 52.

The Court: The other would be 57?

The Clerk: That is right.

Mr. Fennelly: I object to them as clearly incompetent, as not in furtherance of any conspiracy.

670

*Fred Blaser—for Government—Direct*

The Court: I think I have seen one of them.  
Mr. Reis: Yes. That is the inquiry (handing to the Court).

The Court: Overruled.

Mr. Fennelly: Exception.

(Government's Exhibit 52 for Identification now received in Evidence.)

(One other document marked Government's Exhibit 57.)

671

New York, November 27, 1942

10:30 A. M.

TRIAL RESUMED

FRED BLASER, resumed the stand.

*Direct examination continued by Mr. Reis:*

672 Q. Mr. Blaser, after you sent letters to the Minneapolis & Northwestern National Bank & Trust Company on April 9, to which you received a reply on May 4, and you also sent a telegram, I show you a copy of this letter and ask you if this comes from your files, kept in the ordinary course of business? A. Yes, sir.

Q. I show you this letter. Was that a response to the one that you just identified? A. Yes, sir.

Mr. Reis: I offer letter dated May 6, 1937 in evidence, and I also offer a letter dated May 8, from the Northwestern Bank & Trust Company in evidence (handing to Mr. Fennelly).

The Court: If there is to be more correspondence, let the other side see them. Get them all together.

*Fred Blaser—for Government—Direct*

673

Mr. Fennelly: I object as incompetent and irrelevant.

The Court: Upon the general ground; is it?

Mr. Fennelly: Yes, beyond the time, something they did in an investigation, nothing to do with the conspiracy.

The Court: All right. Overruled.

Mr. Fennelly: Exception.

(Letter dated May 6, 1937, marked Government's Exhibit 58.)

(Letter dated May 8, 1937, marked Government's Exhibit 59.)

674

Mr. Fennelly: I object to this letter.

Mr. Reis: I haven't offered it yet.

Q. I just show you this letter, copy of a letter, and ask you if this is from your files? A. Yes, it is.

Mr. Reis: I offer this letter in evidence, letter dated April 30, addressed to Walter T. Roberts.

Mr. Fennelly: Objected to as incompetent, irrelevant and immaterial.

The Court: The same grounds?

Mr. Fennelly: Yes.

The Court: Overruled.

Mr. Fennelly: Exception.

675

(Marked Government's Exhibit 60.)

Q. Looking at these letters, one of May 6, Government's Exhibit 58, one of May 8, Government's Exhibit 59, and a letter dated April 30, to Walter T. Roberts, Exhibit 60, look at them to refresh your recollection, and tell me when for the first time did you find out that these bonds were stolen, these 15 Minnesota bonds? A. On or about the



5th of May, 1937 Mr. Spears, from the State Attorney General's office came into our office and wanted to see our books, which we showed him.

Q. Mr. Spears came in? A. Yes.

Q. Did you know the bonds were stolen when you sent the letter to the Northwestern National Bank & Trust Company on April 29, 1937, Government's Exhibit 54? A. Mr. Howe of A. E. Ames claimed when I went there to see him on or about this date that the bonds had been stolen.

677 Q. Did you have a talk with Turley the same day you went to see Mr. Howe of Ames & Company, around April 29th or 30th? A. Yes. After I left Mr. Howe's office, Ingalls and I went up to see Turley and informed him what we had been told.

Q. What did Turley say and what did you say to Turley?

Mr. Fennelly: I object as incompetent, not binding on Mr. Bollenbach.

The Court: Same ruling.

Mr. Fennelly: Exception.

678 Q. What did you say to Turley and what did he say to you? A. I informed Turley that Mr. Howe of A. E. Ames told us the bonds were stolen. Turley flatly denied it. He said it was not so.

Q. You say you saw Mr. Spears around May 5, 1937? A. That is correct.

Q. Did you see Turley? A. Yes, that evening.

Q. What did you say and what did he say to you? A. We again told Turley that Spears had told us that the bonds had been stolen, and Spears added the information that the bonds had been taken out.

Mr. Fennelly: I object.

The Court: Just a minute. This is a conversation with Turley, is it?

The Witness: Yes.

Mr. Fennelly: I withdraw the objection.

A: (Continuing) That Spears had also informed us that the bonds had been stolen, and added to what Mr. Howe said, both Ingalls and I were quite upset by these facts. This is the second time that we were told by the authorities that the bonds had been stolen.

Q. Is this a conversation you had with Turley? A. Yes. Turley finally admitted—

Q. What did he say? A. He first denied it, as usual, and we pinned him down and he finally admitted that the bonds had been stolen. 680

Q. What did he say about them being stolen? A. He said that Long Drink of Water took them out of the court house at Minneapolis.

Q. Did you tell Turley and give him the letters you had written to the Northwestern National Bank? A. Yes, I showed Turley all the copies of the letters that we had sent to these banks.

Q. Did you show him a copy of the letter that you sent to the Hotel New Yorker? A. I showed him copies I sent to them.

Q. What did he say? A. He said, "That is fine, and your files pertaining to this whole transaction—" 681

Mr. Fennelly: That is on the same day, your Honor?

The Court: Is that the same day?

The Witness: On or about May 3rd.

Q. Did you see Turley again shortly thereafter? A. I saw Turley several times after Mr. Spears had been in our office.

Q. Was there any other discussion with Turley with reference to the Minnesota & Ontario bonds? A. Yes. He

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*Fred Blaser—for Government—Direct*

just told us to be prepared for any further investigation and have our file at hand and see that it has got all this correspondence and everything else pertaining to it. At that time, during the interim, on or about May 5th and the latter part of the month—

Q. Is that 1937? A. 1937. I had seen Turley several times because the case was involved and I realized—we both realized we were in hot water.

The Court: That is what you said?

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The Witness: I asked him to give us some attention as to how an individual could stay in business. He said he would try to do that.

Q. Is your memory exhausted as to any other statements made by Turley or you to Turley or Ingalls to Turley, to one another, in reference to these bonds?

The Court: Have you told all you remember?

The Witness: I think I have, your Honor, except—

The Court: Except what?

The Witness: I know something of another incident that happened the latter part of May.

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Q. What is it? A. The latter part of May, 1937, an agent from the Federal Bureau of Investigation came in, Mr. Moran, and questioned us about the transactions, and I told—gave him the—

Mr. Fennelly: I object to it, your Honor, as incompetent.

The Court: What about it?

The Witness: Gave the same story.

Mr. Fennelly: No part of the conspiracy.

Mr. Reis: If the conversation was in line with covering up and alibing, preparing an alibi, I think

it is binding to show the course of conduct thereafter.

The Court: I think I will sustain the objection for the present.

Q. Do you remember Turley saying, "You better keep your mouth shut or you will all go to jail"? A. Yes.

Q. When was that?

Mr. Fennelly: I move to strike that out as not binding on the defendant.

The Court: Denied.

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Mr. Fennelly: Exemption.

Q. When was that, Mr. Blaser? A. On or about this time in May, 1937.

Q. What was the regular commission under the Street arrangements for transferring bonds of this type? A. We charged three-fourths of a point.

The Court: That is given on the regular—

The Witness: There was nothing in such a rule that I know of outside of the fact that it was an over-the-counter transaction.

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Q. Was 10 per cent permitted? A. You could have charged 10 per cent.

Q. What did you put on your books? A. We made \$106 on the transaction.

Q. You put three-fourths of 1 per cent brokerage fees on your books? A. Yes.

Q. The \$400 you never showed on your books at all? A. No, sir, we did not.

Q. You knew there was something wrong if you cleared bonds taken in a switch? A. Yes.

Mr. Fennelly: I move to strike it out.

688

*Fred Blaser—for Government—Cross*

The Court: Overruled.

Mr. Fennelly: Exception.

Mr. Reis: You may inquire.

*Cross examination by Mr. Fennelly:*

Q. Mr. Blaser, a switch in securities, may also be a transaction, for example, where at the year end a holder of a bond wants to sell and take a tax loss, if he thinks something is going to rise he may switch into another similar type of bond, for example? Is that called a switch?

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A. Yes.

Q. So a switch is primarily legitimate among people who do deal in securities? A. It always is.

The Court: Do you call that legitimate for tax purposes, to do that?

The Witness: I am not qualified to say that, your Honor, but I do know they are legitimate switches.

Mr. Fennelly: I trust your Honor is not indicating it is not.

The Court: I was just asking a question.

Mr. Fennelly: By the Internal Revenue Bureau.

690

The Court: We are not going to have any argument. I was just asking him to see, that is all.

Q. When Mr. Turley told you that Long Drink of Water had stolen these securities from the court house in Minneapolis, he was referring to Peter Burns?

Mr. Reis: I object to that.

The Court: Do you know about whom he was referring? Ask him that.

Mr. Fennelly: May I not ask if he does not know he was referring to Peter Burns?

Mr. Reis: He said Long Drink of Water, without mentioning Burns.



Mr. Fennelly: I am not asking you.

The Court: Sustained. Did he mention any name at all?

The Witness: No, sir.

The Court: That Long Drink, that description, had that ever been used in any way before?

The Witness: Not to my knowledge, no, sir.

Q. What I want to know is don't you know that he was referring to Peter Burns? A. Am I permitted to answer that?

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The Court: All right, answer it.

The Witness: Yes, I do know that.

The Court: How do you know it?

The Witness: I do—

Q. Didn't Mr. Turley also tell you that Mr. Burns had been out there making lists at the court house in Minneapolis? A. Yes, he did.

Q. When was it that you were first examined by Mr. Spears of the State Attorney General's office? A. On or about May 5, 1937.

Q. Was he the first one of any State or Federal agency who had examined you in connection with this matter? A. Yes, it was.

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Q. Did Mr. Spears take a question-and-answer statement from you? A. No, sir, he did not take a written statement about it.

Q. Weren't you at the Attorney General's office? A. No, sir, right in my office.

Q. So he never examined you under oath? A. No, he did not.

Q. You never told Mr. Spears that you had ever met a man by the name of Mr. Brown, did you? A. I have forgotten exactly what I told Spears. I know that I told him as we had it in our books—

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*Fred Blaser—for Government—Cross*

Q. Just answer my question, please. Isn't it a fact that you never told Mr. Spears anything about ever meeting anybody by the name of Mr. Brown in Mr. Turley's office? A. I do not recall that.

Q. Don't you know that you did not tell Mr. Spears that? A. I do not recall that. I know I told Mr. Spears with respect to the whole transaction.

Q. Did you tell him the truth? A. I told him as we knew it at that time, yes.

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Q. When were you next examined by a representative of any governmental agency? A. The latter part of May, 1937.

Q. May, 1937? A. That is right.

Q. By whom were you examined then? A. Mr. Moran, a Federal agent.

Q. That is, of the F. B. I., is that correct? A. Yes.

Q. Where did Mr. Moran examine you? A. In our office.

Q. Did he take any written statement from you? A. I believe he did take something down in writing.

Q. You did not tell Mr. Moran that you had met a Mr. Brown at Mr. Turley's office, did you? A. I do not recall what I told Mr. Moran.

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Q. Didn't you tell Mr. Spears that a Mr. Roberts had brought in these Minnesota bonds into your office for sale? A. I do not recall that. I know I told Mr. Spears, I gave Mr. Spears the story pertaining to this transaction.

Mr. Fennelly: May I have page 208?

Mr. Reis: Yes (handing to Mr. Fennelly).

Q. Didn't you testify on the trial of the other defendant in this case that you had told Mr. Spears, the State Attorney General, that somebody by the name of Roberts had brought the bonds into your office for sale? A. If I

said it, it is so. I do not recall. The trial took place a year ago.

Q. You mean if it appears in the record it is what you testified to at the last trial, is that correct? A. That is true.

Q. I refer to page 208 of the minutes of this other trial, the second question appearing on that page, and ask you to read it and see whether or not your recollection as to the fact that you told Spears, the State Attorney General, that a man Roberts had brought in to you for sale these Minnesota & Ontario Paper Company bonds? A. Yes, I did say that. That is right. 698

Q. Doesn't that also refresh your recollection that you never told Mr. Spears anything about any Mr. Brown? A. I probably did not, if it is not there.

Q. Did you tell any different story to the F. B. I. investigator Moran than you did to Mr. Spears, the State Attorney General? A. I do not recall what I said to Mr. Moran. I probably told the story along the same lines that I told Spears.

Q. Didn't you testify at the last trial that you had told Mr. Moran the same story that you told Mr. Spears? A. If I said so in my testimony at the last trial, it is so. I do not recall what I said. 699

The Court: He said a minute ago that he probably told him the same story.

The Witness: I probably told him the same story. I had no reason to tell him any different story.

Q. I ask you to look at page 211 of your testimony on the last trial. Does that refresh your recollection that you did so testify, the first question on that page at the last trial, that you did tell Mr. Moran, the F. B. I. agent, the same story, in substance, that you had told Mr. Spears, the

State Attorney General? A. I said that was so, that I told substantially the same story that I told Spears.

Q. Doesn't that refresh your recollection that you never told F. B. I. agent Moran as to ever having met a Mr. Brown at Mr. Turley's office? A. I probably did not.

Q. Does that refresh your recollection that you did not? A. There was a purpose about it.

Q. I am not asking you that. Doesn't that refresh your recollection as to the fact that you did not? A. I probably did not tell him about Mr. Brown. I admit that.

Q. When was the next time after meeting Mr. Moran in May, I think you said, when you talked to any investigating agent? A. Several days after Moran came to our office Ingalls and I came up here to identify certain pictures.

Q. At that time did you give a question and answer statement? A. No, I did not.

Q. Do you know anyone by the name of Nova Brown? A. I met him at the last trial.

Q. Do you know whether or not Mr. Brown, Nova Brown, was a client or man who used to go in and out of Mr. Turley's office? A. I never knew about Mr. Nova Brown, and have never met him until I met him in the court.

Q. You do not recall ever seeing him before? A. No, I did not ever see him. I did not know who he was.

Q. At this meeting that you described in Mr. Turley's office, the first meeting where you say Mr. Bollenbach was present, I understand you to say that you were told that these bonds had been taken in a switch for some real estate? A. That is the story Brown told us.

Q. They had been taken by some salesman whom you were told you could not meet, is that correct? A. That is right.

Q. I think you had also testified that you had some conversation about cashing a check for \$2,500? A. That is right.

Q. And that was a check of Hart Smith & Company?

A. It was a Street house check.

Mr. Fennelly: May I have that check, please, and the deposit ticket and the Berendson bank account?

Mr. Reis: \$2,500 Hart Smith check (handing to Mr. Fennelly).

Q. Were you shown the check at this meeting? A. No, sir.

Q. You say you were asked to cash this check? A. We were asked if we could cash the check.

Q. Didn't you know that the check was in possession of the National Safety Bank? A. I did not. I did not know anything about the check nor the form of it.

Q. It appears from Government's Exhibit 29 that that check was deposited with the National Safety Bank on the 3rd day of February, 1937, and the witness from the bank, Mr. Schnapp has testified that he never gave the check back to anyone. You say you were not told on February 5 when you say you were at this office that that check was in the possession of the National Safety Bank? A. I do not recall that, no. I know nothing more about the check than I told you. We were asked to cash that, if we could cash it, and there was a commission in it. We never saw the check.

Q. Weren't you told the National Safety Bank was not going to give up the check, that they had it? A. We were not told anything about it.

Q. And you were asked to cash this check? A. That is right.

Mr. Fennelly: May I have the check of Walter Roberts?

Mr. Reis: Yes (handing to Mr. Fennelly).



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*Fred Blaser—for Government—Cross*

Q. You never met anyone by the name of Walter Roberts, did you? A. No.

Q. You knew that Mr. Bollenbach was not Walter Roberts? A. He was introduced to me as Brown. That is all I knew him by.

Q. So that you knew he was not Walter Roberts? A. That is right.

Q. Whose handwriting is the words "Blaser & Ingalls" on Exhibit 53? A. The endorsement? That is my signature.

707 Q. The signature on the check is yours? A. That is right.

Q. And the "Endorsement Guaranteed" and the signature "Walter T. Roberts" is yours? A. That is mine.

Q. Did you see anyone sign that check "Walter T. Roberts" on there? A. No.

Q. But you guaranteed the endorsement? A. That is right.

Q. You say Mr. Bollenbach went to the bank with you? A. That is right.

Q. But you cashed the check? A. He handed the check to the teller. However, the teller handed the money and I took the money from him and went back to the office.

708 Q. You kept that money? A. That is right.

Q. You did not take the money up to Mr. Turley's office? A. No, I did not.

Q. You did not give Mr. Bollenbach any of the money? A. No, sir.

Q. I think you said Mr. Ingalls went up to Mr. Turley's office, at least he left you with the money, is that right? A. That is right.

Q. You were not present on the occasion of Mr. Ingalls going up there with the money to Mr. Turley's office? A. No, sir.

Q. Do I understand you to say that you sent this blank

check up to Mr. Turley's office? A. We brought it up, Ingalls and I the Monday that we sold the bonds.

Q. You say you brought it up? A. I do not know whether I carried it up; Ingalls or I, but it was in our possession when we went up to Turley's office.

Q. Had you signed it at the time? A. No, a perfectly blank check.

Q. A blank check. Where did Blaser & Ingalls have an account before the one that was opened at the Underwriters—was it the Underwriters Bank? A. Lawyers Trust Company.

Q. On that account Campbell Mason and you had to countersign the checks? A. That is right.

Q. Before you could withdraw the money? A. That is right.

Q. Isn't it a fact that either you or Mr. Ingalls stole \$700 or \$900 out of this account that you were operating for Mr. Turley at Blaser & Ingalls? A. We never stole any money from Turley. The record of the account is right in our ledger. He owed us almost \$800 which we had difficulty in getting, and we just took it because it was due us.

Q. You didn't take it? A. We did take it. It was due us. We had an agreement with Turley.

Q. It was because you did take it that Campbell Mason was put in by Turley as a co-signer on that account? A. After we told Turley that we had taken the money and used it for operating expenses, Campbell Mason insisted on coming in and countersigning all checks.

Q. Didn't Turley accuse you of stealing the money? A. No.

Q. Didn't Campbell Mason tell you that he did? A. Campbell Mason never accused us of stealing it.

Q. Didn't he tell you that Turley had accused you of stealing it? A. I do not recall that Campbell Mason told us that.

Q. After Campbell Mason had to act as co-signer on this account, you opened an account at the Underwriters Trust Company so as to avoid having Campbell Mason sign checks on your business, isn't that right? A. If that was so we could put through transactions without having to go to Campbell Mason every time. There were many times when Campbell Mason did not come up and we were left in a lurch about signing, somebody to countersign the check.

Q. Campbell Mason used to be drunk, wasn't that the reason he could not come down? A. I do not know anything about it.

Q. It was for that reason that you opened the Underwriters Trust Company account, so that Campbell Mason would not know what money you had withdrawn from the funds? A. It was done as I have said before to enable us to put transactions through and had nothing to do with Turley.

Q. So that Campbell Mason would not have to countersign the checks? A. That is right. That is right.

Q. In 1934, was that the first time that you were convicted? A. Yes, sir.

Q. When was the next time? A. In 1939. We were not convicted. We were indicted.

Q. In 1939 you were indicted? A. That is right.

Q. That was in the Seaman case? A. The Solly Seaman case.

Q. Did you plead guilty in that case? A. Yes, sir.

Q. Were you ever sentenced? A. No, sir.

Q. When were you next in trouble with any authorities? A. This indictment. There was an indictment in 1938, in April, 1938. I will take that back. The National Printing Appliance case.

Q. That was this Seaman case? A. That is right.

Q. Did you plead guilty as to that? A. Yes.

*Herbert G. Jacobson (Recalled)—for Government—Direct* 715

Q. What was that for? A. Mail fraud.

Q. Did you receive a sentence? A. I received a suspended sentence.

Q. You testified in that case? A. Yes, sir.

Q. Testified in the Seaman case? A. Yes, sir.

Q. You were indicted in this case? A. Yes, sir.

Q. When did you plead guilty? A. At the first trial, December, last year.

Q. You have not been sentenced? A. No, sir.

Mr. Fennelly: That is all.

Mr. Reis: That is all.

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(Witness excused.)

Mr. Reis: May I call Herbert Jacobson to the stand, with your Honor's indulgence?

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New York, November 27, 1942.

HERBERT G. JACOBSON, recalled.

717

*Direct examination by Mr. Reis:*

Q. Mr. Jacobson, when I came in the building this morning you were outside my office, weren't you? A. Yes.

Q. You wanted to talk with me, didn't you? A. Yes, sir.

Q. You said you had something to say about your testimony, didn't you? A. Yes, sir.

Q. And I told you—

Mr. Fennelly: I object to that.

The Court: Overruled.

718 *Herbert G. Jacobson (Recalled)—for Government—Direct*

Q. I told you if you had anything to say and wished to say it to the Judge to say it in the courtroom? A. Yes, sir.

Q. Have you got anything to say about your testimony on the stand day before yesterday? A. Yes, sir.

Mr. Fennelly: I object to the form.

The Court: Overruled.

719 Q. What do you wish to tell the Court and jury? A. First I wish to apologize to your Honor and apologize to the jury. My testimony was correct in every respect with the exception of the identification of Mr. Bollenbach.

Q. What do you mean "with the exception of the identification of Mr. Bollenbach"? A. That Mr. Bollenbach was present in the meeting at the restaurant at the time in question.

Q. In other words the man you see in the courtroom here is the man who was in Schwartz's restaurant on or about February 5, 1937? A. Yes.

Q. Can you give us any explanation as to why you did not identify him in the courtroom?

720 Mr. Fennelly: I object to his explanation.  
The Court: Overruled.

Mr. Fennelly: Exception.

A. Only that I did not want to hurt anyone. I have had no dealings of any kind with Mr. Bollenbach at any time.

Q. When you say you had no dealings, you mean outside of your conversation in Schwartz's restaurant? A. Yes, sir.

Q. So that your testimony before the Grand Jury on November 1, 1939 was true when you said that Bollenbach is the man who was in the restaurant with Burns and Turley? A. Yes.

Q. You now state that he is the man? A. Yes, sir.



*Herbert G. Jacobson (Recalled)—for Government—Cross* 721

*Cross examination by Mr. Fennelly:*

Q. At the close of court on Wednesday were you ordered and did you hear the Court instruct the United States Attorney to file an information against you on account of perjury? A. I do not know what the ground was.

The Court: Violation of probation.

Mr. Reis: Violation of probation.

Mr. Fennelly: I stand corrected; for violation of probation.

The Court: Violation of probation.

The Witness: Yes, sir.

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Q. And that the testimony was ordered and the time fixed to proceed on this? A. Yes, sir.

Q. As I was leaving the building with Mr. Bollenbach, did I meet you? A. Yes, sir.

Q. Did you tell me then that despite the fact that they tried to furnish you that information, that the fact was that you could not remember who that fourth man was in the restaurant? A. At the time you told me you did not care to discuss anything about the case with me, and I said that Mr. Bollenbach should not push me over—

723

Q. That is right. A. As you were walking away.

Q. Isn't it a fact that you did say that to me? A. That I said what?

Q. That it was true that you could not tell who the fourth man was at Schwartz's restaurant and that you had told the prosecuting attorney that and the F. B. I. agents were told, each one of them, that many times? Didn't you say that to me? A. I do no recall saying that to you, sir.

Q. Would you deny that you said it? A. Yes, sir.

Mr. Fennelly: That is all.

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*Ernest Dudley Ingalls—for Government—Direct*

Mr. Reis: That is all, Mr. Jacobson.

The Court: You have now told the truth, have you?

The Witness: Yes.

*By Mr. Reis:*

Q. Did you come down here voluntarily of your own free will this morning? A. Yes, sir.

(Witness excused.)

725

ERNEST DUDLEY INGALLS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Ingalls, by whom are you employed? A. At the present time?

Q. Yes, now. By the United States Government? A. That is correct.

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Q. Do you know Fred Blaser? A. I do, yes, sir.

Q. How long have you known him? A. Since 1919.

Q. Did you ever go in business with him? A. I did, yes.

Q. When was that? A. Around June, 1936.

Q. How long were you in business with him? A. About a year; just about a year.

Q. Do you know George Turley? A. I do.

Q. How long have you known him? A. I know Turley since about 1928.

Q. Do you know Peter Burns? A. I do.

Q. How long have you known him? A. I have seen him around the Street for quite a number of years.

*Ernest Dudley Ingalls—for Government—Direct*

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Q. In what capacity? A. I think he sold stock lists.

Q. How long have you known him? A. Great many years? A. I have seen Burns around since 1930, I guess.

Q. Do you know Campbell Mason? A. I do, yes.

Q. Coming down to January, 1937, where was Blaser & Ingalls located? A. 32 Broadway.

Q. Who was your partner? A. Fred Blaser.

Q. Did you have anybody associated with you in that firm? A. No.

Q. When did Campbell Mason show up in the picture? A. Campbell Mason was down there when George Turley had his account there.

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Q. You recall meeting this defendant Bollenbach? A. I do.

Q. When did you first meet Bollenbach? A. I met him in the office of George Turley around the first part of February.

Q. What year? A. 1937.

Q. Did you know him as Bollenbach when you first met him? A. No, I did not. I was introduced to him as Brown.

Q. By whom? A. Mr. Turley.

Q. Where did this meeting take place? In Turley's office? A. Turley's office.

729

Q. Will you tell the Court and jury what the conversation was between you, Bollenbach, alias Brown, and Blaser and yourself? A. We went up there. Turley introduced us to this Mr. Bollenbach as Mr. Brown.

Mr. Turley said he had a customer or salesman who wanted to sell some bonds, that we could not meet the salesman, but that Brown would bring the bonds down to us, we were to transact our business with Brown. He said that the bonds were taken in a switch, that this salesman had sold some real estate in Long Island to the World's Fair and had taken these bonds in payment.

Turley said there was a question that it might go to the SEC, because the salesman may have charged a little too much for the real estate and not allowed quite enough for the bonds; that was the reason they were willing to pay a substantial commission for the trade.

I turned to Turley and asked him if that was the entire story about the bonds. Yes, he said he knew the bonds were taken in a switch.

Q. What more was said at that conversation? A. Bollenbach, that is, Brown, asked us whether we had sent out any circulars on bonds? I said Campbell had gotten a circular out on the Rocky Mountain Fuel bonds. He asked if he could have one, he wanted a circular so that he would come in there and make a trade.

Q. What do you mean? A. He would receive this circular and he would come in and ask about Rocky Mountain Fuel bonds, presumably would transfer the fund and would trade and sell the Minnesota & Ontario Paper bonds and then take the proceeds and perhaps buy some of these Rocky Mountain Fuel bonds.

Q. Was there anything else said at that conversation? A. Then we left the office. Brown turned to us and asked us if we could clear a check; he would pay the usual commission if we could clear a check for about \$2,500. We asked him what was the matter with it? He said nothing the matter with it, that he would pay us a good commission. We said we could handle it. Brown left. But prior he said the check was for \$2,500 and was the proceeds of 10 bonds which had been sold of this Minnesota & Ontario Paper Company; they had already sold them and the man had endorsed the check on a typewriter; it was still at the bank. Turley said, "Do not take away the check at all."

Q. Was there an arrangement made between you, Blaser and Turley as to how much commission you were to get for it? A. The amount of the commission is \$500 for clearing

these bonds. Turley told us when we put it through the books to put through the regular commission, the trade commission, three-quarters of a point.

Q. You pleaded guilty to this indictment? A. Yes.

Q. You are awaiting sentence? A. Yes.

Q. And you also pleaded guilty in the Solly Seaman transaction? A. Yes.

Q. You are awaiting sentence? A. Yes.

Q. You pleaded guilty in the National Print Company case? A. Yes.

Q. The Solly Seaman transaction took place subsequent to this indictment?

Mr. Fennelly: I object.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. Did it? A. Correct.

Q. When did you next see Bollenbach, or Brown, as you knew him? A. He came down to the office the next day and we gave him this circular on the Rocky Mountain Fuel bonds, and he brought the bonds down. I think it was on a Saturday around closing time, a little before twelve o'clock. We gave him a receipt for the bonds and Blaser called up and quoted to him the market, which was  $26\frac{1}{2}$  to  $27\frac{1}{2}$ .

Q. You mean \$260 to \$270 a bond or gold note? A. That is correct.

Q. Go ahead. A. It was too late to sell the bonds then. Brown said we better sell them the first thing Monday morning.

Q. Did Brown bring anything down that Saturday? A. He brought the bonds down and a written confirmation on the Hotel New Yorker stationery.

Q. I show you this Government's Exhibit 48. See if you can identify it? A. That is right.

Q. That is what Brown brought down that Saturday morning? A. With the bonds.



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*Ernest Dudley Inghells—for Government—Direct*

Q. Around February 5th or 6th? A. Yes. I do not remember whether it was February 6th.

Q. It was Saturday? A. That is correct.

Q. If I told you that was February 6th, would it refresh your recollection? A. It was on a Saturday, I know that.

Q. Did you put through the deal? A. We sold the bonds on Monday morning. We called up Turley and reported what we had gotten for the bonds and he asked us to bring a check, a blank check, which he would have Walter T. Roberts endorse. We went up Monday afternoon and took it to Turley. It was about the next day that Brown brought the check down endorsed.

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Q. What do you mean? A. Bollenbach brought it down to our office endorsed in blank. We delivered the bonds on Wednesday. The check cleared on Thursday. Bollenbach came down and Blaser went to the bank with him and Blaser brought the money back. Blaser came back to the office alone with the money, and I took it up to Turley that afternoon.

Q. February 11? Look at this check. Is this it, Government's Exhibit 53? A. That is correct.

Q. How much is that check for? A. \$3,937.50.

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Q. What did you do with the cash that Blaser brought you? A. I myself personally took it to Turley's office.

Q. Whom did you meet there? A. When I first got into the office at 521 Fifth Avenue Miss Case told Turley I was there. I glanced around the office and I saw this Mr. Burns sitting there.

Q. Who? A. Burns, Peter Burns.

Q. I show you Government's Exhibit 5. Is that the man you are talking about? A. That is correct.

Q. Go ahead. A. I went into Turley's office. As I got in the office Roberts was sitting there with Turley. Turley sat at a desk. I gave Turley the money that I brought. He counted it out and gave me my share and commission he said he would pay us.

Q. How much? A. Around a little over \$400; around \$400. He put some in the desk drawer, some in his pocket and put a certain pile of money on the desk there. I do not how much it was. As he did this the chap Burns came in and took the money off his desk and put it in his pocket. Brown was sitting there. Brown made some remark to Turley, "Where the hell do I come in?" or something to that effect. I saw it was an argument, and I went back to the office.

Q. Who did you see in Turley's office when you came up, before you went in? A. Peter Burns.

740

Q. Did you know Burns as Roberts? A. No.

Q. You never met Roberts? A. Never met Roberts.

Q. Did you ever meet Roberts? A. No.

Q. You say there was about \$4,000 that you brought up, \$3,937? A. Yes, I remember it was something around that amount.

Q. You took about \$400? A. Yes.

Q. That left Turley with approximately \$3,600? A. About that.

Mr. Reis: That is all.

Mr. Fennelly: May I have the Blaser & Ingalls check?

741

Mr. Reis: Yes (handing to Mr. Fennelly).

*Cross examination by Mr. Fennelly:*

Q. I think you testified that at Turley's desk this time that you are just speaking about you saw Mr. Roberts there? A. No, Brown. Brown was there.

Q. You never saw anyone by the name of Mr. Roberts? A. No, I never did.

Q. Did you see anybody endorse this name Walter T. Roberts on this check, Government's Exhibit 53? A. No, sir, I did not. No, sir, the check was brought down to the office by Brown.

742

*Ernest Dudley Ingalls—for Government—Cross*

Q. In whose handwriting is the endorsement under the words "Walter T. Roberts"? A. That is Blaser's.

Q. All of it? A. Yes, sir.

Q. Mr. Turley at some later time told you, did he not, that these bonds had been stolen by Burns from the court house in Minneapolis? A. After that—after the District Attorney or Attorney General came down to see us at our office and told us the story, we confronted Turley that that is what he told us, yes.

743

Q. Around that time did Turley refer to Burns as that Long Drink of Water, I think he called him? A. That is correct.

Q. At this first meeting in Mr. Turley's office, which I think you fixed around February 5; around that time, the first week in February, Mr. Turley was the one who did most of the talking, was he not? A. That is right.

Q. And that is what you already testified to? A. I think I did.

Q. It was Turley who called you up and asked you to come up there? A. That is correct.

Q. Did you ever hear of Nova Brown? A. Down in this building down here, at one of the trials.

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Q. Do you know whether or not he was in and out of Mr. Turley's office for a period of years?

Q. Did you know that Mr. Nova Brown was the same one who went in and out of Mr. Turley's office? A. I did not know anything about Nova Brown.

Q. On this first occasion, which is about February 5, 1937, when you were up at Mr. Turley's office you were intoxicated, weren't you? A. No, sir.

Q. Are you sure? A. No, sir.

Q. At about that time you were drinking very heavily? A. I would perhaps take a drink every now and then. I would not say I was intoxicated at the time.

Q. At that time didn't you drink absinth? A. No, sir.

Q. When were you first interrogated by any agent of either the State or Federal Government? A. I do not quite remember the first time. I am sorry.

Q. When were you first interrogated about this matter by any representative of either New York State or the Federal Government? A. I think the Attorney General came down to our office around the first week in May. I do not remember the time; around the first week in May he came down.

Q. In 1937? A. In the latter part of May or the first of June I was called down to this building here to identify some pictures.

Q. Was it Mr. Spears who came to your office? A. That is correct.

Q. You and Mr. Blaser were both present when Mr. Spears talked to you? A. That is right.

Q. Neither you nor Mr. Blaser told Mr. Spears anything about Mr. Brown going to Mr. Turley's office, did you? A. Not at that time, no.

Q. Was Mr. Moran the first F. B. I. agent whom you saw after you had talked with Spears? A. I think so.

Q. You never told Mr. Moran anything about Mr. Brown being in Mr. Turley's office, did you? A. No, sir.

Q. Since when have you been employed by the Government of the United States? A. Since, I think, this April.

Q. This April? A. Last April, correct.

Q. When was the first time that you were ever convicted of a crime? A. In 1938.

Q. In what connection was that? A. That was one of these cases.

Q. That was the Seaman case? A. Yes.

Q. You pleaded guilty? A. That is correct.

Q. And testified? A. That is right.

Q. You did not receive any sentence? A. Not as yet. I am awaiting sentence.

748

*Claire P. Denmark—for Government—Direct*

Q. Thereafter when was the next time that you were convicted of any crime? A. It was the case right after that.

Q. When was the next time, sir? A. Shortly after that.

Q. What date was that? A. That was this case.

Q. When did you plead guilty, do you recall? A. About a year ago.

Q. Were you in—I think it is called the National Print Applicance case? A. Yes.

Q. When was that? A. That was in April.

749

Q. What year? A. A year ago; last April.

Q. That was using the mails to defraud? A. That is correct.

Q. And you pleaded guilty in that case? A. That is right.

Q. What sentence did you receive? A. Probation for a year.

Q. You did not go to prison? A. No.

Q. You have received no sentence in this case?

Q. You are now working for the United States?

The Court: Yes, he said so.

750

CLAIRE P. DENMARK, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mrs. Denmark, did you ever work for George Turley?  
A. Yes, I did.

Q. How long did you work for him? A. For five years.

Q. Starting when? A. I think it was in 1933.

Q. When did you stop work there? A. 1938.



*Claire P. Denmark—for Government—Direct*

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Q. When? A. July.

Q. I show you this Government's Exhibit 35, a photograph of George Turley. Is this the George Turley you worked for? A. Yes, it is.

Q. Where was his office located in January and February, 1937? A. In 1937? I think we were at 521 Fifth Avenue at the time.

Q. Do you know the defendant Chester Bollenbach? A. Yes, I do.

Q. How long have you know him? A. Since about 1935.

Q. How often did you see him in Turley's office? A. Quite often.

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Q. That is from 1935 up through when? A. About 1937.

Q. After January or February? A. Yes.

Q. Did you know him under any other name than Bollenbach? A. No, I did not.

Q. Was he a client of the office? A. No.

Q. What did he do up there, do you know? A. He came to see Mr. Turley.

Q. I show you this photograph, Government's Exhibit No. 5. Do you know who that is? A. Yes, I do.

Q. Who is it? A. That is Mr. Burns.

Q. Peter Burns? A. Yes.

Q. How often did you see him at Turley's office? A. I saw him there quite often.

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Q. When did you first see Burns in Turley's office? A. Maybe at the end of 1935 or 1936.

Q. Early in 1936? A. I think so.

Q. Some time around the latter part of 1935 or early 1936, you are not sure? A. No.

Q. Was Peter Burns a client of the office? A. No.

Q. Did you have occasion to call up Mr. Burns on the telephone from Turley's office? A. Yes, I did.

Q. Did you have occasion to call Bollenbach from Turley's office? A. Yes.

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*Claire P. Denmark—for Government—Direct*

Q. Did you use the same telephone number for both?

A. Yes.

Q. Did you see Herbert Jacobson in Turley's office? A.

Yes, I did.

Q. I show you Government's Exhibit 11. Is this a photograph of Herbert Jacobson? A. Yes, it is.

Q. When did you first see him in Turley's office? A. I think it was in 1935.

Q. I show you Government's Exhibit 36 and ask you if you know who that is? A. Yes, I do.

755

Q. Who is that? A. That is Mr. Mason.

Q. What is his first name? A. Campbell.

Q. How long was he in Turley's office? A. How long?

Q. Yes. A. For a few years.

Q. Was Jacobson a client of the office? A. Well, he had one matter in the office.

Q. Did Jacobson use the facilities of Turley's office?

A. Yes, he did.

Q. Did Mason use the facilities of Turley's office? A. Yes, he did.

Q. Did you ever receive any long distance calls for Turley from Mr. Burns or Mr. Bollenbach? A. Yes, sir.

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Q. When, do you recall? A. During the years 1935 and 1936 at different times I received long distance calls.

Q. From whom? A. Mr. Burns and Mr. Bollenbach.

Q. Do you know from where? A. Well, I know they were out of town,—from Philadelphia.

Q. In 1937, the early part of 1937, did you receive any long distance calls from Mr. Burns or Mr. Bollenbach? A. Yes, I think I did. I received them every once in a while.

Mr. Fennelly: I object to what she thinks.

The Court: Is that your recollection?

The Witness: Yes.

The Court: Your recollection is what?

The Witness: I did.

*Claire P. Denmark—for Government—Cross*

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Q. Did you have a switchboard? A. Yes.

Q. Did you take care of it? A. Yes.

Q. You also did stenographic work? A. Yes.

Mr. Reis: You may inquire.

*Cross examination by Mr. Fennelly:*

Q. Mrs. Denmark, you actually have no recollection as you sit on the witness stand of any long distance call back in January, 1937, do you? A. I do not know whether it was just January, but I know there were long distance calls. I remember that definitely.

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Q. Do you know whether they were in January, sitting there on the witness stand?

The Court: She has said so.

Q. Do you have any recollection, present recollection, now of receiving any long distance call back in January of 1937? A. No.

Q. Mr. Turley practiced law, did he not? A. Yes.

Q. You never heard of Mr. Bollenbach under any other name than Bollenbach in that office, did you? A. No.

Q. Was there a Mr. Nova Brown who used to go into Mr. Turley's office? A. Yes.

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Q. Was he a client? A. No.

Q. Mr. Mason, that you spoke of, he worked for Mr. Turley, did he not? A. Yes.

Q. Was he intoxicated frequently? A. Yes, sometimes.

Q. In 1936 and 1937? A. Sometimes.

Q. He was pretty badly intoxicated in that office at times? A. I do not know.

Mr. Reis: I cannot hear you, Mrs. Denmark.

The Witness: I do not know. Sometimes he was.

He was in another office.

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*Claire P. Denmark—for Government—Redirect  
—Recross*

*Henry Bose—for Government—Direct*

*Redirect examination by Mr. Reis:*

Q. When did you last see Nova Brown in that office?

A. I think it was 1935.

Q. Do you know what happened to him? A. Yes, I do.

Q. What? A. He was sent to prison.

Q. When? A. About 1935, the end of 1935.

Q. You did not see him in that office since that time, did you? A. No.

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Mr. Reis: That is all.

*Recross examination by Mr. Fennelly:*

Q. Do you know Mr. Ingalls? A. Yes, I do.

Q. Did you ever see him in that office? A. Yes.

Q. Did you ever see him intoxicated there? A. Never.

HENRY BOSE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

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*Direct examination by Mr. Reis:*

Q. Mr. Bose, what is your occupation? A. Bank clerk, Corn Exchange Bank.

Q. What branch? A. Head office, 13 William Street.

Q. Are you familiar with the records of that bank? A. I am familiar with some of the records of the bank.

Q. Pursuant to a subpoena issued to you did you produce certain records for the United States Attorney's office? A. I produced certain records.

Q. I show you those records. Are they the records produced by you pursuant to that subpoena? A. Yes, it is.

*Henry Bose—for Government—Direct*

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Mr. Reis: Peter Burns' signature card to the Corn Ex. Bank (handing Mr. Fennelly).

The Court: This will be exhibit what?

The Clerk: 61, sir.

Mr. Fennelly: I object, incompetent not binding on this defendant.

The Court: The same ground?

Mr. Fennelly: Yes.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 61.)

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Q. I show you a transcript of the Bond and Share List Company, Peter Burns, and ask if this transcript was produced pursuant to the subpoena, produced by you? A. Yes.

Q. What month of the Bond and Share List Company does the transcript reflect, what year? A. It starts with the balance in 1937.

Q. What month in 1937? A. January 1, 1937.

Q. Yes. A. I will have to look it over. This goes right through the year, showing the balance as of—

Q. I am not interested in the balance. Was that for January and February, 1937? A. January and February, 1937, yes, sir.

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Mr. Reis: I offer this transcript in evidence.

Mr. Fennelly: Same objection, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 62.)

Q. Now I show you a deposit slip and ask you if that was produced by the bank pursuant to a subpoena duces tecum served upon the bank? A. Yes, deposit ticket for



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*George R. McDougall—for Government—Direct*

\$1,200 in cash, and the card of the Bond and Share List Company, February 15, 1937.

Mr. Reis: I offer this deposit ticket in evidence.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 63.)

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Q. You say the Bond and Share List Company was Peter W. Burns, according to that signature card that I showed you? A. He was the owner of the Bond and Share List Company.

Mr. Reis (Addressing the jury): I show you the signature card of Peter W. Burns and the deposit ticket and the transcript of the bank accounts showing his average deposits in January and February of 1937, also a later deposit.

That is all, Mr. Bose.

Mr. Fennelly: No examination.

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GEORGE R. McDOUGALL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. McDougall, by whom are you employed? A. Employed in the office of the Recorder of Deeds.

Q. Where? A. Wilmington, Delaware.

Q. In the year 1935 by whom were you employed? A. I was Registrar in Chancery in the State of Delaware.

Q. What do you mean by "Registrar in Chancery"?

*George R. McDougall—for Government—Direct*

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A. That is an elective office and has charge of all receiver-ships and equity proceedings in New Castle County.

The Court: The Court of Chancery?

The Witness: Yes.

Q. That is the State Court in Delaware? A. Yes.

Q. Was there a proceeding in that court known as the General Theatre Equipment, Inc.? A. Yes.

Q. 1935? A. Yes.

Q. What was that proceeding? A. It was a receiver-ship that was filed in our court.

Q. Did any holders of bonds or notes of that corporation file them with the proofs of claim in your court? A. Yes.

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Mr. Fennelly: I object to this as incompetent, irrelevant and immaterial.

The Court: Same ground, is it?

Mr. Fennelly: The same as we discussed, yes.

The Court: Overruled.

Mr. Fennelly: Exception.

Q. I show you this paper dated December 28, 1932, and ask you what that is? A. That is a proof of claim filed by Mr. Crowder in General Theatres for 20,000 shares of stock.

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Q. \$20,000 worth of bonds? A. \$20,000 worth of bonds.

Q. Do the numbers appear in the proof of claim? A. Yes, seems to be 15411 and M 15420 and M 15789 to M 15798.

Q. Were those bonds on file with that proof of claim? A. Yes.

Q. Is that a certified copy of that proof of claim that had been filed? A. An exemplified copy.

Mr. Reis: I offer this in evidence. (Handing to Mr. Fennelly.)

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*George R. McDougall—for Government—Direct*

Q. I ask you to look at this paper and ask you what it is? A. That is also a proof of claim in General Theatres Company.

Q. Were the bonds filed with that proof of claim? A. Yes.

Q. By whom were they filed? A. By Mr. Crowder.

Q. How many bonds were filed in your court? A. \$30,000 worth.

Q. What were the bond numbers? A. The numbers of the bonds in this one are 15401 to 15410.

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Q. Ten bonds? A. Yes, sir.

Q. Is that an exemplified copy from your records? A. Yes, it is.

Mr. Reis: I offer this in evidence. (Handing.)

The Court: Were the bonds filed in all cases?

The Witness: They were attached to the proof of claim.

Mr. Fennelly: Same objection.—I have not seen it.

The Court: Same ruling.

Mr. Reis: You haven't seen this one?

Mr. Fennelly: No.

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Mr. Reis: Wait a minute (handing Mr. Fennelly).

(Marked Government's Exhibit 64.)

Mr. Fennelly: Same objection as to this exhibit.

The Court: Same ruling.

Mr. Fennelly: Exemption.

(Marked Government's Exhibit 65.)

Q. Did there come a time that you had occasion to look for those bonds in those files? A. Yes, sir.

Q. When? A. May I refresh my recollection?

The Court: He wants to refresh his recollection.

Mr. Fennelly: The witness did not testify that there were any bonds on file.

Mr. Reis: He did, with the proof of claim.

The Court: You did?

The Witness: Yes. January 21, 1937.

Mr. Fennelly: I am sorry. I did not hear this testimony. Has the witness testified that he has seen them, or what did he testify to?

The Court: Did you see the bonds?

The Witness: The bonds were filed with me. I received them by registered mail personally from Mr. Crowder, Washington, D. C. 776

The Court: What is the date?

The Witness: January 21, 1936 was the date of the letter received from Mr. Crowder asking that the bonds be returned. That letter was presented to the Court in the trial about a year ago.

Q. After you received the letter from Mr. Crowder, what did you do? A. I asked the clerk to get me the file and he brought it back. I looked for the bonds. They were not there. Certain bonds were missing from each claim; 5 bonds missing from one claim and 15 bonds from another. 777

Q. I show you this letter dated January 21, 1936. Is that the letter you produce in this court? A. Yes, it is.

Mr. Reis: I offer this letter in evidence. That is the letter you were talking about of Mr. Crowder?

The Court: Do you know the date?

Q. Does that refresh your recollection as to the date?

A. Yes.

Q. Proceed. What did you do? A. When they brought the file back I found some of the bonds were missing from each claim; 5 from one and 15 from the other. I inquired

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*George R. McDougall—for Government—Direct*

about them. They said they did not know what had happened to them, they had been under lock and key in the files and no one had access to the files with the exception of the clerk and myself. I know that when they sent the file over that a man by the name of Johnson came in and looked the file over.

Q. Did you see Johnson? A. Yes.

The Court: Is that something you saw?

The Witness: Yes, sir.

The Court: Of your own knowledge?

The Witness: Yes.

The Court: Go ahead. A man by the name of Johnson.

The Witness: A man by the name of Johnson, came into our office.

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Q. Do you recall when? A. November 7, I believe, as near as I can recall, 1935.

Q. Yes. A. And asked to see the file.

Q. Do you see Johnson in the court room? A. I do.

Q. Who is he? A. The gentleman sitting there with the glasses on.

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Mr. Reis: Indicating the defendant Bollenbach.

Q. Did you have a conversation with him?

Mr. Fennelly: I have an objection to the entire line so I won't have to jump up every minute?

The Court: Yes.

Mr. Fennelly: Exception.

Q. Did you have a conversation with this man that you knew as Johnson? A. Yes, I talked to him.

Q. November, 1935? A. Yes, sir.

Q. What was that conversation? A. Well, I then went over and asked him if he was being waited on. He said



yes. I told him if there was anything he wanted to just ask the clerks and they would be glad to give it to him, in the way of the files.

Q. Did he refer to any specific matter in your court when you were speaking with him? A. He said he had an interest in the claims, the bonds, filed in the General Theatres and that was the talk that he had at that particular time.

Q. When you spoke with him? A. Yes, sir.

Q. Did anyone have to sign any documents to get files?

A. No, sir.

The Court: Tell us everything that you recall.

The Witness: He came in and he said he represented a man by the name of Turley, an attorney. I asked him if he was an attorney. We have a rule that only attorneys have access to our records, and my clerk asked him if he was an attorney.

I asked the clerk what the gentleman was doing.

The Court: Where was the defendant?

The Witness: At the table, looking in our office.

Q. In the court house? A. He had a file which he was looking at. Knowing that only attorneys had access to those files, I made it my business to know whether he was an attorney.

Mr. Fennelly: I object to what the clerk said to him.

The Court: In his presence.

Mr. Fennelly: No, he was there at the table, as I understood.

Q. You had a conversation with a clerk? A. Yes, sir.

Q. Then you went over to this man? A. Yes.

Q. What was this conversation with this man that you knew as Johnson? A. I asked him if he was being waited

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*George R. McDougall—for Government—Direct*

on. He said yes. I told him if there was anything he wanted to ask the clerk, and he would be glad to get it. He had represented to the clerk, in my presence he handed the clerk a card with his name on it with "Turley". I do not remember where Mr. Turley's office was located, but he was an attorney at law, and they were representing receiverships, if I remember right.

Then he proceed to go through the file, and I suppose he was in the office—

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Q. He went through the files? A. He went through the file and was through.

Q. Was that the only conversation you had there with him? A. Yes.

Q. After that conversation did you see him again in the court house, you personally? A. That was the last trip to the court house. He was in two other days before, November 7. That date I do not think—

Q. How do you place November 7th? A. Through the record that was made by the receiver.

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Q. After you had seen him the last time on or about November 7, 1935, you say that you had occasion, through a letter from Mr. Crowder on January 31st to get the bonds he had filed? A. Yes.

Q. You found out there were no bonds there? A. Some of the bonds were there but not all of them.

Q. Had you given permission to anyone to remove the bonds from the claims? A. No, sir.

Q. You are sure of that? A. No, sir.

Q. What did you do after that? A. I found the bonds were missing and I immediately notified the Chancellor, and he came down in the office and said, "Well,"—

Q. You contacted the Chancellor? A. Yes.

Q. Then what did you do? A. It was all left in his hands.

*George R. McDougall—for Government—Cross*

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Q. Did you make a trip to New York? A. He called the counsel.

Q. Forget what anybody else did except yourself. A. I got in touch with the counsel and we came to New York.

The Court: Do not forget it, but do not relate it.

Q. You came to New York? A. Yes.

Q. Where did you go when you came to New York? A. City Bank Farmers Trust Company and over there Watson & White, the brokers, had telephoned and we got the missing numbers.

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Q. The same numbers as on the proofs of claim? A. They were, yes.

The Court: On these other two occasions what did you observe the defendant doing, if anything?

The Witness: He reviewed the files each time he was in.

Mr. Reis: That is all.

*Cross examination by Mr. Fennelly:*

Q. Mr. McDougall, when was it that you made these notes that you used there to refresh your recollection? A. When I received the subpoena from the court.

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Q. When was that, sir? A. March 31, 1941, I believe.

Q. So that the first time that you made these notes, as I understand it, was in March, 1941? A. That is the time I made these notes, yes, sir.

Q. Are they the original notes that you made? A. Yes, sir.

Q. You had not made any other notes prior to that time? A. No, sir.

Q. You have no recollection of this date, have you, of November 7, 1935, yourself? A. I know it was in the Fall.

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*George R. McDougall—for Government—Cross*

Q. But you do not have any recollection actually of the date? A. No, the record was—the actual date is not in my own file.

The Court: You have no records?

The Witness: No.

The Court: The question is as to your recollection.

The Witness: I have a recollection that it was in the early Fall.

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Q. You haven't any recollection that it was any specific date like November 7, 1935? A. I know it was in 1935.

Q. You have no recollection of any specific date, have you? A. No.

Q. Now, did you make any written report to anyone after the time that you found these bonds were missing, which I think you fix in 1936, was it? A. Yes.

Q. January? A. Yes.

Q. Did you make any written report to anyone? A. No written report, no, sir.

Q. Did you put in writing to anyone the name Johnson as having been the person who was in your office? A. No.

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Q. Have you the name "Johnson" written in your memorandum book? A. I have.

Q. You do not have—

The Court: It is typewritten?

The Witness: Typewritten memorandum.

Q. You have no independent recollection of the name Johnson? A. I remember he told me his name. He had a name card. He handed me a name card with the name Johnson on the bottom of the card.

Q. Was that printed? A. Yes, a printed card.

Q. The name Johnson was printed on the card? A. Yes.

Q. Was the name, Turley, on the card? A. Yes. Yes, Turley was in the middle of the card and Johnson on the bottom.

Q. Printed on the card? A. Yes, printed name card.

Q. Did he leave the card with you? A. He left it in the office, yes, sir.

Q. Where is that card? A. I do not know. I left the office in 1936. It is an elective office. My time expired December 31, 1936. I was no longer in the office. Those notes were cleaned out. I did not keep the name card. It stayed in my desk quite a long time.

Q. How long did it stay in your desk? A. Several months.

Q. It stayed in your desk after this investigation started? A. No, it had been destroyed before that.

Q. It had been destroyed before that? A. Yes. The investigation did not start until 1941. I was not there.

Q. Did you turn it over to the Chancellor? A. Yes—I did not turn the card over to the Chancellor. I just told him the man's name.

Q. Did any State agent come in? A. They did not interview me on that date. It was left in the Chancellor's hands. He said, "Leave it in my hands."

Q. You did not turn over to the Chancellor the printed name card with Turley and Johnson printed on the card? A. I did not, sir.

Q. You are perfectly sure that the name Johnson was printed on this card of Turley's? A. I am positive that the name Johnson was on the card, yes, sir.

Q. Are you sure it was not the name Jackson? A. My memory serves me that it is Johnson.

Q. Are you sure it was not Jackson? A. My memory serves me that it was Johnson.

Q. Have you got the name Johnson or Jackson written in the book? A. I have Johnson written in the book.



796

*George R. McDougall—for Government—Cross*

Q. From what did you make those notes in 1941 when you made them? A. From certain records.

Q. From what records? A. Records in the care of the Chancellor.

Q. From records in the Court of Chancery did you copy the name Johnson in 1941 when you made these notes which you have in your hand? A. I did not take any names from the record. I remembered the man's name that was in the office.

797.

Q. You remembered it in 1941, a period of six years, is that right? A. Yes, certainly I did. You see the man that was in the office, the only one who had access to the claims. That is why I remember it.

Q. Did you talk to anyone before you made this memorandum or these notes that you have in your possession there? A. Actually the case had been discussed with the clerk.

Q. What was the clerk's name that you discussed it with? A. Mr. Hines.

Q. Did he have any written memorandum or any notes? A. I cannot answer that.

798.

Q. Did he have anyone to discuss it with? A. Miss Fitzpatrick had notes, that is, Miss Fitzpatrick, the secretary, and Mr. Logan, counsel for the receiver.

Q. Isn't that where you got the information from that you put down in this case? A. No, I did not. I remembered the name.

Q. Did Miss Fitzpatrick have the same memorandum? A. She had memorandums, yes, sir.

Q. Did you look at that memorandum which she had? A. I did not.

Q. Did Miss Fitzpatrick tell you about the memorandum she had? A. She did.

Q. Did she tell you what names were on her memorandum? A. She said the name of Johnson, the same as I have.

Q. Is that the only information she said she had in her memorandum? A. She has the full name of Johnson.

Q. Didn't she ever tell you that it might be Jackson?  
A. If she did I do not remember.

Q. Did she tell you she had a name in her notes? Is that right? A. That is right.

Q. Was there ever a time after November 7, 1935, that you were shown a picture of Mr. Bollenbach? A. No, sir, not until 1941.

Q. I said was there ever a time? A. Yes, 1941, I saw a picture.

800

Q. When was that? A. 1941.

Q. Where was it? A. In the Attorney General's office.

Q. Of New York State? A. Yes, sir.

Q. At 80 Center Street? A. In this building.

Q. Do you mean the United States Attorney's office?  
A. United States Court.

Q. You did not identify Mr. Bollenbach at that time, did you? A. Yes, sir.

Q. You did identify him from his picture? A. Yes, sir.

Q. Did you see him at that time? A. Yes, sir.

Q. Where did you see him? In the court room? A. He was brought in a room.

801

Q. Who brought him in? A. I could not say.

Q. Do you see the man in the court room that brought him in? A. No, I do not.

Mr. Reis: When you say a room, you mean a court room, during the trial?

The Witness: Yes.

Mr. Reis: And the baliff brought him in?

The Witness: Yes.

Mr. Fennelly: I object to Mr. Reis examining him now.

Mr. Reis: I do not want any insinuation that the man was brought into a little room, with just this man.

802

*George R. McDougall—for Government—Cross*

The Court: You can bring it out later, if it is a court room, Mr. Reis. You may proceed.

Q. Was that the first time that you had seen this man since 1935, when you saw him— A. Yes, sir.

Q. Before you saw him in the court room, had you been shown his picture? A. Yes, sir.

Q. Was that the same day? A. Same day.

Q. Who showed you the picture? A. Well, Mr. Milenky, I believe.

803

Q. Before you saw Mr. Bollenbach in the court room here in 1941 you had not seen him since some time that you place in November, 1935, is that right? A. That is right.

Q. Did you advise the police in Wilmington when you found these bonds had been missing? A. No, sir, I did not.

Q. You had no talk with any police investigators? A. No.

Q. Or State investigators? A. I did not.

Q. Was there any investigation at that time? A. Yes.

The Court: The Chancellor is a judge?  
The Witness: Yes.

804

The Court: You turned it over to the Chancellor?  
The Witness: Yes, that is right.

Q. May I see these notes that you refreshed your recollection from, please? A. (Witness hands document to Mr. Fennelly.)

Mr. Fennelly: Will you mark these for identification.

Q. Is there anything else in here except notes of yours?  
A. To my knowledge, I do not remember.

The Court: Just mark the book itself.

*George R. McDougall—for Government—Cross*

805

Mr. Reis: All right.

The Witness: Yes, there is quite a lot—

Q. Will you just indicate the pages that are notes about this matter? A. These two pages (indicating).

Q. How about the following typewritten page? A. That is just the memorandum.

Q. That is about this matter too, isn't it? A. Yes.

Q. So there are three pages with notes on them, is that right? A. Yes.

Mr. Fennelly: Mark the front of the book.

806

(Marked Defendant's Exhibit C for Identification.)

Q. Didn't you see an F. B. I. investigator in 1936? Do you recall whether there were several F. B. I. agents in the office? A. During 1936 they, of course, asked me if I could identify any of them as the man that was in the office.

Q. And you did not, is that right? A. I did not, no, sir.

Q. Did you mention the name of Turley to any F. B. I. investigator that came to see you in 1936? A. That I cannot remember.

807

Q. Don't you remember that you did not? A. No.

Q. Didn't you testify at the last trial that you did not mention the name of Turley to any F. B. I. investigator in 1936? A. I would not like to say. I do not remember.

Q. Let me see if I can refresh your recollection.

Mr. Reis: Will you read the question and answer?

Mr. Fennelly: I will let the witness look at it if you do not mind. I refer you to page 380 (handing to witness).

The Witness: What is this, the trial in 1941?

808

*George R. McDougall—for Government—Cross*

Q. The trial of the other defendants. Mr. Reis has just handed me this testimony beginning with the question:

"Q. In 1936 did you mention the name of Turley?"

You read it and see whether or not it refreshes your recollection. A. Yes.

Q. Does that refresh your recollection as to whether you mentioned in 1936 the name of Turley to the F. B. I. investigator? A. I do not think I did.

809 Q. And yet you say that the name of Johnson was on the card and the lawyer's name, Turley, is that right? A. If my memory serves me right, that is correct.

Q. Did the card have Turley's address on it in New York City? Did it? A. That I cannot remember.

Q. The F. B. I. agents came back to you twice in 1936, didn't they? A. Yes, sir.

Q. You did not tell them of the name of Turley at any time during that year, did you? A. They asked me to see if I can identify the photographs.

Q. I am asking you whether or not you told them anything, mentioned the name of Turley? A. No.

Q. When you saw these photographs in New York in 1941, in Mr. Reis's office, you did not identify Mr. Bollenbach then as Mr. Johnson, did you? A. I did.

810 Q. Didn't you testify on the last trial that you did not identify him? A. I do not know.

Q. Weren't you asked this question and didn't you give this answer—or these questions, rather:

"Q. So that the first conversation you had after the previous one in 1936 was in March, 1941, is that correct? A. Correct."

Do you remember that? A. Yes.

Q. "Q. Where was that conversation? A. Mr. Reis's office."

Do you remember that? A. Yes.

Q. "Q. You came up to New York? A. Yes, sir."



Do you remember that? A. Yes.

Q. "Q. Who was present at that conversation? A. Mr. Reis and Mr. Milenky." A. That is correct.

Q. They talked to you? A. Yes.

Q. Do you remember that? They were referring to the note book? A. Not that note book.

Q. I beg your pardon? A. Probably they were.

Q. "Q. How long did that conversation take place? A. It was part of an afternoon."

Do you remember that? A. Yes.

Q. "Q. You were asked to identify Johnson again, weren't you? A. Yes, sir." Q. 812

Do you remember that? A. Yes, sir.

Q. "Q. Did you do it? A. No, sir."

Do you remember that? A. I do not remember that, no, sir.

Mr. Reis: Will you continue, Mr. Fennelly, please?

Q. "Q. You did not see this man that was brought in before? A. He was not brought in."

Q. Now, sometime in 1935 do you recall making up a copy of a bill of complaint in this General Theatres Equipment matter? A. I do not. 813

Q. By the way, who was the plaintiff in that action, do you recall? A. I do not at the present time. It was General Theatres.

Q. Was the lawyer's name Jackson? A. I cannot say.

Q. That was brought into the case? A. I cannot say.

Mr. Reis: Did you look at the record?

Q. See whether there is any in there? A. I cannot say.

Q. Do you recall whether you prepared any certified copy of the bill of complaint in this matter in 1935? A. I do not.

814

*George R. McDougall—for Government—Redirect*

Q. Do you recall meeting a lawyer named Jackson? A. I do not.

Q. Would your records at the court house disclose whether any certified copy of the bill of complaint was prepared and given to anyone at or about that time in 1935? A. I could not say.

Mr. Fennelly: That is all.

*Redirect examination by Mr. Reis:*

815

Q. You came to this building around March, 1941, didn't you? A. That is right.

Q. You came to see me and Mr. Milenky pursuant to a subpoena? A. Yes, sir.

Q. Photographs were shown you, weren't they? A. They were.

Q. They were shown to you one at a time, the photographs? A. They were shown to me one at a time.

Q. How many were shown to you? A. Several. I do not just remember.

Q. Describe the procedure when they were shown to you one at a time? A. If my memory serves me, you did ask me if I had ever seen this gentleman before.

816

Q. Were any names mentioned? A. Johnson or Bollenbach.

Q. Were any names mentioned when you were shown the photographs? A. No.

Q. You were shown a group of photographs? A. That is right.

Q. You were asked if you could identify any of those photographs, is that right? A. Yes, sir.

Q. When you came to Bollenbach, you recognized him? A. Yes.

Mr. Fennelly: Let the witness say.

The Court: Let him testify.

Q. What happened? A. Either you or Mr. Milenky asked could I identify these pictures. I said this was the gentleman that was in the office, Mr. Johnson.

Q. You identified the picture of Bollenbach? A. Not as Bollenbach. I did as Johnson.

Q. Was this one of the group of pictures shown you (handing to witness)? A. Yes, sir.

The Court: Is that an exhibit?

Mr. Reis: No, I offered it for identification.

The Clerk: Exhibit 13 for Identification in this case.

Mr. Reis: I offer it in evidence.

Q. Was this one of the pictures that were shown you?  
A. Yes.

Mr. Reis: I offer it in evidence.

(Government's Exhibit 13 for Identification now received in Evidence.)

Q. Do you recall being in a court room in this building?  
A. Yes, sir, I do.

Q. Were there many people in the court room? A. I would say yes.

Q. Was that the first time you ever saw this man personally since 1935, when you knew him as Johnson? A. The day in the court room?

Q. Yes. A. I saw him in the corridor in March, in a corridor or a room.

Q. What building? A. This building.

Q. Was that down in room 318, the court room? A. I do not just remember whether it was in this building in one of the—

Q. Court rooms? A. Court room.

Q. That was not the time of the trial? A. No.

Q. That was in March? A. That is right.

820 *George R. McDougall—for Government—Recross*

Q. You came back here in January of 1941? A. That is right.

Q. So you saw this man you knew as Johnson in March, 1941, in this building? A. Yes.

Q. Court room 318? If I told you that the court room— A. We were in so many offices I do not just remember which one.

Q. You are sure that this man Bollenbach is the man you knew as Johnson? A. Yes, sir. I may state at the time he wore tortoise shell glasses when he was in our office in 1935.

821

*Recross examination by Mr. Fennelly:*

Q. The man that you saw in the court house, did he have an overcoat on in December, 1935? A. Naturally he had a coat on. It was cold weather.

Q. An overcoat? A. Yes.

Q. What color was it? A. I cannot answer that question.

Q. You have no recollection? A. No.

Q. Did he have a hat on? A. Naturally would have.

Q. Where was it that you saw him? A. In my office.

822 Q. How long did he stay there? A. Probably two or three hours.

Q. He had his hat and coat on? A. They do not usually sit in the office with a hat and coat on.

Q. On this particular day that you observed him? A. No. He also broke his glasses when he was there. He asked me to tell him where he could get them repaired.

Q. Did he ask you? A. No, one of the clerks who was there.

Q. As to where to have them fixed? A. Yes.

Q. When you saw him in March, 1941, in the court room, that was after you had seen the pictures in Mr. Reis's office with Mr. Milenky, is that right? A. Yes.

*Thomas Franklin Hines—for Government—Direct* . . . 823

Q. You do not recall testifying in the case on trial there that you could not identify him in March, 1941, in these questions and answers which I read to you? A. No, sir.

Q. I just want to ask you one question: At the time that you were in Mr. Reis's office, I think you said March, 1941, didn't either Mr. Reis or one of the F. B. I. agents tell you that Mr. Bollenbach had been down in Wilmington, and that a Mr. Bollenbach had told the government agents that he had been? A. I believe there is something to that effect, yes, sir.

Mr. Fennelly: That is all.

824

Mr. Reis: That is all.

(Witness excused.)

THOMAS FRANKLIN HINES, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Hines, what is your occupation? A. I am now the office manager for the Wilmington Housing Authority.

825

Q. Where is that? A. In Wilmington; Delaware.

Q. Where were you employed in the latter part of 1935?

A. I was a clerk in the office of the Registrar in Chancery. That was the office having the records of the Court of Chancery of New Castle County, Delaware.

Q. Wilmington, Delaware? A. Yes.

Q. How long were you a clerk in that court? A. From 1931 up to 1940.

Q. Was there a proceeding in that court known as the General Theatres Equipment case? A. Yes.

Mr. Fennelly: May I have an objection to this line of testimony here, so that I won't have to object again?



826

*Thomas Franklin Hines—for Government—Direct*

The Court: Yes.

Mr. Fennelly: Exception.

Q. Did you see the defendant Chester Bollenbach here at any time? Did you ever see him in your office? A. He came into the office in the Autumn of 1935 and asked to see the records of that General Theatre Equipment case.

Q. Did you have a conversation with him at the time?

A. Yes, I did.

827

Q. State it to the Court: A. He first came and he asked to see the records of the General Theatres Equipment Company receivership, and I showed him the docket and all of the papers in that case. I took him back to the front part of the office where they have the table for visitors and he went through the records, and while he was going through them I was standing back there talking to him quite some time. He showed me his brief case. He had a couple of papers that he had taken in some receivership pending in courts in Philadelphia in the brief case. And then again after he had gone through the documents he asked to see the claim file. I handed over the file to him and he went through the claims. While I talked to him part

828

of the afternoon one day he asked to see a list of stockholders or bondholders in that case, and a young lady by the name of Miss Fitzpatrick, secretary to one of the lawyers representing the receivers in this case, sat there and I said there is a lady from the attorney for the receiver and the receiver has those records in his office.

He said, "Well, I want to see them," and took her name and her office address, and I believe later on he went over to see those records.

Q. Do you recall whether or not you asked him if he was a lawyer? A. When he first came in he represented himself as associated with a firm of attorneys in New York who were going into these different cases for a Senate investigating committee.

Q. Do you recall whether or not this man told you his name was Bollenbach? A. He handed me a card, as all visitors do. We ask them for their cards to identify themselves. He passed over a card. As I recall, his name was Johnson and on the card was another name. I do not recall the other name. The card was handed to Mr. McDougall when Mr. McDougall later talked to him.

Q. Do you know whether or not that man wore glasses at the time? A. He did.

Q. Did anything happen that refreshes your recollection? A. When he passed over the claim file he went through them and brought them back later in the afternoon, he came back and said, "I have broken my glasses. Can you direct me to a place where I can have them repaired?"

I told him where he could find a man about two blocks from the court house.

Q. You say this conversation took place in the Fall of 1935? A. In the Fall of 1935.

Q. Did you ever see this man again? A. I never saw him again until during last year, I believe.

Q. You are sure this is the man that spoke to you in the clerk's office in the Court of Chancery in Wilmington in the Fall of 1935?

Mr. Fennelly: I object to the form of the question.

Q. Are you sure this is the man, indicating the defendant Bollenbach, that he is the man you spoke to in your office in the Fall of 1935? A. I am certain of it.

Mr. Reis: You may inquire.

*Cross examination by Mr. Fennelly:*

Q. Mr. Hines, Mr. Bollenbach gave you a card, did he not? A. Yes.

832

*Thomas Franklin Hines—for Government—Cross*

Q. What name was on the card? A. I do not recall the name on the card, because later on it was passed over to Mr. McDougall, when Mr. McDougall came in and inquired about it, indicated a man by the name of Johnson.

Mr. Fennelly: I haven't asked you any question yet. May we strike that out?

The Court: I will let it stand.

Mr. Fennelly: Exception.

833

Q. I understood you to say to Mr. Reis in answer to his question that his name was on the card. A. Well, I could not be sure whether his name was on it. I do not remember the name on the card.

Q. You do not recall what his name was, do you? A. I recall his name was Johnson.

Q. Didn't you testify at the last trial that you did not recall what the name was that was on the card? A. That is right.

Q. And the name Johnson was not on the card? A. I could not be sure what name was on the card.

834

Q. Mr. Hines, you do not recall, do you, what the name of Mr. Bollenbach was? A. I am sure that he used the name of Johnson.

Q. He gave you a card, did he not? A. That is right.

Q. You do not recall what name was on that card, do you? A. No, I do not.

Q. The name Johnson was not on the card, was it? A. The name came up.

Q. Will you just answer my question whether you recall the name Johnson on that card? A. I do not recall the name on that card.

Q. You so testified at the last trial, didn't you? A. Yes.

Q. That you did not recall it? A. Yes.

Q. When was the first time that you talked to any government agent or state agent about this matter? A. The government agent from Philadelphia, I believe, came around down there about March or April of 1937, and he had several photographs, but none of these photographs he presented to me at that time were Bollenbach.

Q. Did you give a written statement? A. No, I did not give him a written statement.

Q. Did you tell him the name of any man who had been there? A. Yes, I did at the time. I gave him the name of this man as Johnson. I knew him as Johnson.

836

Q. Where did you get the name from that you gave him? Not from your own recollection? A. Yes, from my own recollection.

Q. And you talked to someone about it in the meanwhile? A. In going back over the records to see who had been in there looking at that case.

Q. What records? A. The General Theatres Equipment records.

Q. So you have records in the court house showing who was in? A. There is not any written record to show who was in that special case.

Q. I do not want to misunderstand you, but I understood you to say that in order to refresh your recollection about the name you looked at the records in the court house as to who was in, is that right? A. That is right, to refresh my memory. I had charge of that case—

837

Q. Excuse me just a minute. You did not find the name Johnson on any record that you looked at, did you? A. No.

Q. Were you up to see Mr. Reis and Mr. Milenky in March, 1941? A. That is right.

Q. That was the same time that Mr. McDougall was up, wasn't it? A. That is correct.

Q. You were shown pictures then, weren't you, for the first time? A. The first time I identified Mr. Bollenbach as Johnson. I knew him as Johnson.

Q. That was some five or six years after the event, is that right? A. That is right.

Q. Weren't you told at that time by either Mr. Milenky or Mr. Reis that Mr. Bollenbach had told them that he had been down in the court house at Wilmington? A. No. As soon as I saw the photograph I recognized him.

Q. I did not ask you that. I am trying to inquire from you if it is not a fact that at the time that you say in March, 1941 that Mr. Reis and Mr. Milenky had not told you, one of them, that Mr. Bollenbach had told them that he had been down in the court house? A. That was subsequent to the time they showed the pictures.

Q. Was that the same day? A. It was the same day. We went up one day.

Mr. Fennelly: That is all.

*Redirect examination by Mr. Reis:*

Q. Is there any doubt in your mind that the man you saw in the court house is the man that you spoke to and knew as Johnson in the Fall of 1935? A. I am certain he is the man.

Mr. Reis: That is all.

*Recross examination by Mr. Fennelly:*

Q. You are not certain about Johnson, are you? A. Well, I am sure that he gave the name Johnson.

Q. Did you write it down? A. No, I did not write it down. I have a pretty good memory.

Q. It was not on the card, was it? A. I do not recall the name on the card.

Q. Can you recall any name on the card? A. No.

Mr. Fennelly: That is all.

(Witness excused.)



*Catherine C. Fitzpatrick—for Government—Direct*

841

CATHERINE C. FITZPATRICK, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Miss Fitzpatrick, in the year 1935 by whom were you employed? A. Marvel, Morford, Ward & Logan.

Q. What was that firm? A. Attorneys at law.

Q. Were they attorneys for the receiver in the General Theatres Equipment Corporation, in equity proceedings at that time? A. Yes, they were.

842

Q. Were the proceedings in the court house, the Court of Chancery, Wilmington, Delaware? A. That is right.

Q. Look at this man sitting with the glasses on at this table. Do you see him (indicating)? A. Yes, I see him.

Q. Did you ever see him before? A. Yes, twice before.

Q. Where? A. In Wilmington.

Q. Do you recall when? A. In November of 1935.

Q. Can you tell us the circumstances under which you met this gentleman? A. I first met him in the Registrar of the Chancellor's office and later in our own office.

Q. Did you have a conversation with this defendant in the Registrar of the Chancellor's office in Wilmington in the Fall of 1935? A. Yes, I did.

843

Q. What was that conversation with him? A. Well, he was talking with Mr. Hines inquiring about the stockholders' list of General Theatres. Mr. Hines told him that I was secretary to the attorney and that the stockholders' list was on file in our office.

Q. Then did you have a conversation with this gentleman? A. Then he came to the office in the afternoon and wanted to examine—

Q. Whose office? A. Marvel, Morford, Ward & Logan.

Q. Where was their office located? A. In the Delaware Trust Company Building.

844 Catherine C. Fitzpatrick—for Government—Direct

Q. Did you have a conversation with him then? A. Yes.

Q. Did you know his name at that time? A. He gave the name of Johnson or Jackson, and he said he was from Turley's office in New York.

845 Q. What conversation did you have with him in your office? A. He asked to examine the stockholders' list. Mr. Ward was out of town. I told him I would have to find out. He said if we did not let him see the list he would go into the Court of Chancery and he would be allowed to examine them. I went to Senator Hastings and he told me to let him see them, to see and examine the lists.

Q. In your office? A. In Mr. Ward's office.

Q. Is there any question that this man at the counsel table (indicating the defendant Bollenbach), is the man that you saw in the court office of the Court of Chancery, and then you saw him sometime in the afternoon in your own office? A. Then I saw him a couple of years later in Mr. Ward's office when he inquired about looking at the files of another company.

Q. How long ago was that?

846 The Court: A couple of years later did you say?

The Witness: In September of 1938 Mr. Ward withdrew and I went with him, and I was up there in March, 1941, and it was some time during that time.

Q. Did you see this defendant? A. Yes.

Q. In your office? A. With Mr. Sarbine.

The Court: Who is that?

The Witness: That is the name he gave me.

The Court: Sarbine?

The Witness: Yes.

Q. Do you know what name this man used when you met him in Mr. Ward's office? A. The first occasion?

Q. The third time? A. No, I do not remember.

Q. Did you have a conversation with him the third time? A. Yes.

Q. What was the conversation? A. I asked him if—  
He inquired about looking at the books of the Bankers Finance Corporation. Mr. Ward was attorney for the trustee. I said Mr. Ward was out of town. They said they would not need to see Mr. Ward, they would like to see the books, so I remembered the name, and I told him he could not see it. I asked him if he had not been in the Court of Chancery a couple of years before. He said, yes, he had. When he left I called the clerk of the court and told him.

Q. Did you see him again after that? A. Not until I came—

Q. Up here. That was on the trial of this case? A. That is right.

Q. Last year? A. That is right.

Mr. Reis: You may inquire.

*Cross examination by Mr. Fennelly:*

Q. Miss Fitzpatrick, when was the first time that anyone spoke to you about seeing Mr. Bollenbach in the Registrar's office in Wilmington, do you recall? A. Yes, there was someone, I think from the F. B. I. or some place that gave me photographs to see if I could identify the man.

Q. When was that about? A. Well, I do not know.

Q. Your best recollection? A. I could not say.

Q. Was it in 1935 or 1936? A. I would rather not say because I do not know. There may be a reference in one of Mr. Ward's diaries, because I kept those for reference.

Q. Did you keep the diary? A. We had an office diary.

Q. Do you have that diary with you? A. No.

Q. When did you look at that diary last? A. I looked at it when it was supposed to come up the last time.

850

*Catherine C. Fitzpatrick—for Government—Cross*

Q. Where was it when you looked at it? A. I called Mr. Ward and asked him if I could look at it so I would get my dates straight.

Q. Did you look at it? A. I did.

Q. Where did you look at it? A. I looked at it at home.

Q. Where is that? A. My home is in Wilmington. And then I brought it to Philadelphia with me, and I reviewed the diary before I came up here. Then I returned it to Mr. Ward.

851

Q. You did not bring the diary up here? A. No.

Q. Did you make an entry as to the name of the man who came in and spoke to you in your office on that occasion in November, 1935, in the diary? A. The notation refers to a representative, Mr. Hurley. I thought the man said Hurley.

Q. A representative from Hurley's office? A. I thought it was Hurley, but later a letter came through with Turley. The notation on the diary refers to Hurley.

Q. Is there any name on that diary, of the name of anyone by the name of Johnson or Jackson? A. No, I do not think I put that name in there.

852

Q. The only name you have in there is Hurley, is that right? A. Representative from Hurley's office.

Q. Then you got a letter from a man named Turley, is that correct? A. When people come in to examine stockholders' lists or books, they usually state from what office they come, and he said he came from Hurley's. He said Turley, but I had never heard of that name before, and I wrote it down Hurley.

Q. My question is I understand you to say that a letter—  
A. Later a letter came from Mr. Turley.

Q. When did that letter come? A. Well, I do not know the date. I remember what it was because it substantially said—

Q. Where is that letter? Have you got it? A. No, that letter is in the office of the General Theatres. It is part of the correspondence.

Q. In your office? A. No, not in my office.

Q. I mean Mr. Ward's office? A. The firm, yes.

Q. When did you see that letter last? A. Shortly after its receipt.

Q. Did that letter mention any name? A. Well, as I remember the letter it said he had the right personally to examine the stockholders' lists.

Q. What did it state? A. It said he had the right with Mr. Johnson or Jackson—he asked to look at that list. Then he told me if we did not permit him he would go into the court in Chancery. When he said Turley, I never heard the name Turley. I thought he said Hurley. That is how it appears in the diary reference. Later this letter came. When I saw the letterhead with Turley on it, I knew it was Turley and not Hurley.

854

Q. That gave you the address, Turley's letterhead, in New York? A. I think it was New York, but it has been a long while ago.

Q. Fifth Avenue? A. I cannot say because I have not seen the letter since shortly after it was received.

Q. Did it mention the name of anyone that came to look at those things? A. I do not remember. I think the letter stated it, but I do not think the person examined the stockholders' list.

855

Q. In connection with this General Theatres case did you come across a lawyer named Jackson? A. I do not know.

Q. Was it Mr. Jackson who represented some of the parties? A. Well, I do not know. I have not seen that record for a long while.

Q. Wasn't there a man by the name of Jackson who used to come down and look at papers in connection with that case? A. Well, I do not remember.



856

*Catherine C. Fitzpatrick—for Government—Cross*

Q. You do not remember? A. No, I do not.

Q. Then you say that you met Mr. Bollenbach a couple of years later? A. That is right.

Q. With a man named Sarbine? A. I think his name was Sarbine.

Q. He was a lawyer, was he not? A. I do not know.

Q. Didn't he give you his card? A. No.

Q. Didn't Mr. Sarbine tell you he was a lawyer from Newark, New Jersey? A. I do not know. He did not tell me.

857

Q. Didn't Mr. Bollenbach tell you his name on that date was Bollenbach? A. I do not know whether he did or not.

Q. You do not remember? A. I remember in the court that he either said his name was Johnson or Jackson.

Q. Is this the occasion that you are talking about with Mr. Sarbine? A. No, he came in the office, Mr. Ward's office.

Q. We were talking about two different occasions. I am talking about the occasion when he came in with Sarbine or Sabine? A. Yes.

858

Q. Didn't Mr. Bollenbach on that date tell you his name was Bollenbach? A. I do not know. I do not believe he did, because I was surprised—

Q. Have you any recollection as to what name he gave you on that date when he came with Sarbine? A. No, I do not.

The Court: If any?

Q. If any? A. No, I do not.

Q. You came here in 1941, I think around March? A. That is right.

Q. With Mr. Hines and Mr. McDougall? A. Yes, I did.

Q. Were you all in Mr. Reis's office together? A. That is right.

*Catherine C. Fitzpatrick—for Government—Redirect* 859  
*William P. Major—for Government—Direct*

Q. And Mr. Milenky, I think, was there? A. That is right.

Q. Didn't either one of them tell you that the defendant, that Mr. Bollenbach, had told them that he had been down in Wilmington? A. Well, I think Mr. Milenky told me that he—

Q. Who said that? Mr. Milenky said the defendant told him? A. Yes, I think that is right.

*Redirect examination by Mr. Reis:* 860

Q. After you identified the pictures? A. That is right. I identified the pictures.

Q. How many pictures were shown you? A. There were a number shown.

WILLIAM P. MAJOR, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:* 861

Q. Mr. Major, in December of 1935 what was your occupation? A. Manager and office man for Watson & White.

Q. Where were they located? A. The main office, 149 Broadway.

Q. What was the type of business that Watson & White conducted? A. Stock brokers.

Q. I show you this card and ask you to tell us what that is? A. It is a customer's signature card on the blank of Watson & White, signed T. R. Johnson.

Q. Was this produced pursuant to a subpoena duces tecum served on Watson & White? A. Yes, sir.

862

*William P. Major—for Government—Direct*

Mr. Reis: I offer this card in evidence.

Mr. Fennelly: Same objection, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 66.)

The Court: Lead him to the point of objection.  
Many of these things are formal.

863

Q. I show you all of these documents and ask you if you can identify them? A. Yes, sir.

Q. Are they records brought to this court pursuant to subpoena? A. Yes, sir.

Q. Kept in the ordinary course of business? A. Yes, sir.

Mr. Reis: I offer each one individually in evidence, and I am showing them to Mr. Fennelly.

The Court: Tell us what the transaction was and indicate on these exhibits.

The Witness: Those that Mr. Reis showed me cover a sale through Johnson of \$20,000 General Theatres 1941, in the account of T. R. Johnson.

864

Q. I show you these two books. What are they? A. This book is a blotter kept by Watson &amp; White for December, 1935, and this one is a customers' ledger kept for the same month.

Q. Look at that blotter and the customers' ledger and see if that reflects the sale of 20 General Theatre Equipment bonds?

The Court: A telephone transaction, was it?

Q. Read the numbers off of the particular bonds that were involved? A. On December 17, each for \$1,000, 15406.

*William P. Major—for Government—Direct*

865

to 15410, inclusive; 15406 to 15420, inclusive; on December 16, bonds for \$1,000 each, 15789 to 15798, inclusive.

Q. How much were those bonds sold for?

Mr. Fennelly: Objected to as immaterial.

The Court: Overruled.

Mr. Fennelly: Exception.

A. On December 18, 10 bonds were sold for \$1,870.96; on December 19, 10 bonds for \$1,858.45.

Q. What address did the customer give as his business address and home address? A. 246 Fifth Avenue, New York City.

866

Mr. Reis: May I offer the blotter pages in evidence, Mr. Fennelly?

Mr. Fennelly: I haven't finished these yet (indicating).

Q. While we are proceeding, I show you Government's Exhibit 17 and Government's Exhibit 19. Can you tell me what those checks are? A. Yes, a check dated December 18 for \$1,870.96 and is in payment for \$10,000 General Theatre 6's, 1940;

That \$1,858.45 is in payment of \$10,000 General Theatre 6's, 1940; both drawn to the order of T. R. Johnson.

867

Q. Do you recall how these bonds were sold through your firm? A. Yes, pursuant to a telephone order given to our bond department.

Mr. Reis: I offer 11 papers from the records of Watson & White pertaining to T. R. Johnson, General Theatre Equipment deal, as one exhibit.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

868

*William P. Major—for Government—Direct*

The Clerk: That has been received as Government's Exhibit 67.

Mr. Reis: May I also have pages of the book marked as Exhibit 67, from two books, the ledger and the blotter?

The Court: Same ruling.

Mr. Fennelly: Exception.

Q. By looking at Government's Exhibit 67, can you tell us the nature of that transaction?

869

The Court: He has told us.

Mr. Reis: He said it was by telephone. Mr. Fennelly objects unless the records would show it.

The Court: Do they show it was by telephone? Read it.

870

The Witness: These two order slips, in the upper right-hand corner, in the books of Watson & White, show that the order was placed to the order room directly by the customer's man or partner so employed and has the initials of one, indicating that the order, that it was put on the telephone to the order clerk, and the writing "Name of firm" on both of these, which is written in by the order clerk, the word "Firm," it would show that it was received by telephone, that it was placed through the order clerk's office and it would have to have the same name on it before he accept that for execution.

Q. There is a cancelled check, part of that Exhibit 67. Why is that check torn? A. T. R. Johnson requests payment for the bonds by whatever—

Mr. Fennelly: I object unless the record shows.

The Court: Do you know that?

Mr. Fennelly: Do they show that?



*William P. Major—for Government—Cross*

871

The Court: Let me see it.

(Document handed to the Court by the witness.)

The Witness: There is a billhead from T. R. Johnson dated December 19 in which he requests a check for \$1,858.45. That is the amount of the check which was issued and then the signature torn off because the proceeds were not due until December 20.

Q. That check was never issued? A. No.

Q. It is part of the records of Watson & White? A.

Yes, sir.

872

Mr. Reis: You may inquire.

*Cross examination by Mr. Fennelly:*

Q. On part of Exhibit 67, dated December 17, 1935, on the letterhead of T. R. Johnson, whose initials are under "O. K."? A. The initials of E. W. Lahe, who was also in the margin department at the time.

The Court: Louder.

A. (Continued) These are the initials of E. W. Lahe.

Q. There are some other initials there on December 17, 1935, appearing on the face, I think. Whose initials are they? A. Madaline Kaiser, a cashier in the cashier's cage.

Q. Do you know in whose handwriting this "Kindly hold for instructions," on this memorandum dated December 16, 1935, on the letter head of T. R. Johnson, are? A. No, I do not.

Q. You do not recognize them? A. No, sir.

Q. On the memorandum of the margin department of Watson & White there are some initials on the bottom of that. Whose are those under the letters "E. W."? A. That is E. W. Lahe.

873

874 *Percy Campbell Mason—for Government—Direct*

Q. And on the other side? A. I think it is Florence McCuehn. That was part of our job to make up the address plate. It looks like her initials.

Q. It looks like a "W." Did you have a Warfield? A. He was an order clerk. It may be that. It does not look like it.

Q. What is the first initial? A. His first name was Garrett. It might be "G. W."

Mr. Fennelly: That is all.

875

PERCY CAMPBELL MASON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Mason, were you ever convicted of any crime, or offense? A. Yes, sir.

Q. When? A. Conspiracy to use the mails to defraud.

Q. When? A. That was in 1939.

Q. In this court, the United States District Court? A. 876 Yes, sir, United States Court.

Q. What sentence did you receive? A. Two years.

Q. Do you know George Turley? A. Yes.

Q. I show you Government's Exhibit 35 and ask you who that is? A. Mr. Turley.

Q. Did you ever share space with Mr. Turley? A. I beg your pardon?

Q. Did you ever share space with him? A. Yes.

Q. When I say, "share space" did you pay rent? A. No, I did not pay rent.

Q. Did you work for him? A. Worked for him.

Q. Over what period of time? A. 1935 to the early part of 1937.

*Percy Campbell Mason—for Government—Direct*

877

Q. What were you doing in Turley's office? A. Taking care of rights and warrants in reorganizations.

Q. How old are you, Mr. Mason? A. Sixty.

Q. I show you Government's Exhibit 66. Whose signature is this on the bottom, "T. R. Johnson"? A. My signature.

Q. Did you sign that? A. Yes, sir.

Q. Where? A. Turley's office.

Q. I show you Government's Exhibit 67—

Mr. Fennelly: Would you describe that, please?

Q. This No. 66 is a customer's card? A. Yes.

Q. Watson & White.

Mr. Fennelly: All part of Exhibit 67?

Mr. Reis: No. 66. That is a customer's account.

The Witness: Same answer.

Q. What is the answer? A. I signed it in Turley's office.

Q. Is that an application for mailing privileges at 246 Fifth Avenue? A. Yes, sir.

Q. I show you Government's Exhibit 19, a check from Watson & White—

Mr. Fennelly: Is that marked for identification?

Mr. Reis: 67.

Mr. Fennelly: Just show it to him.

Mr. Reis: You are right.

Q. I show you this paper, application and address for 246 Fifth Avenue. Did you sign that? A. Yes, sir.

Mr. Reis: I offer it in evidence.

Q. I show you Government's Exhibit 17, a check from Watson & White to T. R. Johnson for \$1870.96. Whose endorsement is that? A. That is my endorsement.

878

879

880

*Percy Campbell Mason—for Government—Direct*

Q. What name did you sign? T. R. Johnson? A. Yes.

Q. Where did you sign it? A. Turley's office.

Q. What date? A. Around the latter part of December.

Q. Look at the check. A. 18, I believe it was.

Q. Of what year? A. The 18th of December, 1935.

Q. I show you Government's Exhibit 19, check of Watson & White to T. R. Johnson for \$1850.45 and ask you whose endorsement appears on the check? A. The same endorsement.

Q. What is that? A. T. R. Johnson.

881

Q. Who signed that? A. I did.

Q. What office? A. Mr. Turley's office.

Q. Where was it located at the time? A. 521 Fifth Avenue.

Q. Was your name T. R. Johnson? A. No, sir.

Q. Did you ever use the name of T. R. Johnson? A. That time, yes, sir.

Q. What? A. That time.

Q. At that time. Just for the purpose of signature, or did you meet anybody by that name? A. No, sir.

Q. What? A. T. R. Johnson.

Q. You did not get my question.

882

The Court: You ask two questions at once.

Q. Did you only use that name for the purpose of this endorsement? A. Yes.

Q. Were you ever introduced to anyone as T. R. Johnson? A. No, sir.

Mr. Reis: This paper that I offered before has not been marked.

Mr. Fennelly: Same objection, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

*Percy Campbell Mason—for Government—Cross*

883

(Marked Government's Exhibit 68.)

Mr. Fennelly: Objection to the line of testimony, and an exception.

The Court: Yes, same ruling.

Q. Do you know the defendant Bollenbach? A. Yes,

sir.

Q. How long have you known him? A. Since 1935, I believe; 1935.

Q. Do you know Peter W. Burns? A. Yes, sir.

Q. How long have you known him? A. About the same length of time. 884

Q. Did you ever see Burns and Bollenbach at Turley's office? A. Yes, sir.

Q. Were they alone or together?

Mr. Fennelly: Will you fix the time?

Q. Can you fix the time? A. Well, the latter part of 1935, up to the Summer of 1936 or the Fall of 1936.

Q. When did you leave Turley's office? A. Early in 1937.

Q. Where did you go? A. I went down to 80 Wall Street. 885

Q. Prior thereto had you gone with Blaser & Ingalls? A. No, I had some business with them. I was down there occasionally, yes.

Q. Whose business was it that you looked after at their place of business? A. Mr. Turley's business.

(Mr. Reis hands exhibits to the jury.)

*Cross examination by Mr. Fennelly:*

Q. Did I understand you to say that the endorsement on this check, Government's Exhibit 17, is your handwriting? A. Yes, sir.



886

*Percy Campbell Mason—for Government—Cross*

Q. Also that the endorsement on Government's Exhibit 19, T. R. Johnson, that is your handwriting? A. Yes, sir.

Q. And this signature card for Watson & White, is that yours, this Government's Exhibit 66? A. I believe so, but I do not remember that so well. I believe it is.

Q. I want you to be sure about this so you will not make any mistake— A. Yes, sir.

Q. —as to whether it is or is not? Take an awfully good look at it. A. Yes, sir.

Q. You are sure about it? A. Yes.

887

Q. You recall where you signed that Exhibit 66? A. Yes, in Turley's office.

Q. Did you ever go over to the office of Watson & White? A. No.

Q. Will you look at Exhibit 68 and tell me whether or not the signature next to the printed words "Firm name"; is that your handwriting, the name of T. R. Johnson? A. Yes, sir.

Q. On that same exhibit alongside the printed words "Bulletin Listing," is that your handwriting, the words "T. R. Johnson"? A. Yes, sir.

888

Q. Alongside "Tenant," signed "T. R. Johnson," is that your handwriting? A. Yes, sir.

Q. Where did you sign these three "T. R. Johnsons"? A. Signed in Turley's office.

Q. Were you ever down at 246 Fifth Avenue? A. No, sir.

Q. Do you know who initiated 246 Fifth Avenue Service? A. I do not know that.

Q. You were never in the office, is that right? A. No, sir.

Q. Were you ever in the office after this application was made? A. No, sir.

Q. At that address? A. No, sir.

Q. At the last trial didn't you testify that all these writings "T. R. Johnson" on this exhibit were not in your

handwriting? A. I cannot memorize the testimony, but whatever the testimony was is what I testified.

Q. But now you say they are all in your handwriting, is that right? A. Yes, sir.

Mr. Fennelly: May I have page 334?

Mr. Reis: Yes (handing to Mr. Fennelly).

Q. Do you recall being asked at the last trial this question and didn't you give this answer—

Mr. Reis: Is that direct or cross, Mr. Fennelly?

890

Mr. Fennelly: I am just trying to find out. It looks like direct.

Q. "Q. Now I show you a document for room space at 246 Fifth Avenue and ask you to look at the bottom signature and ask you who wrote that? A. I wrote that."

This was on the direct examination of Mr. Reis.

Do you recall that? A. Yes.

Q. "Q. Did you write the other 'T. R. Johnson' or just the one at the bottom? A. I did not write the other."

A. I do not recall, but whatever the testimony is is what I answered.

891

Q. When you testified at the last trial were you mistaken when you said you did not write the other "T. R. Johnson" on this exhibit, the application for space at 246 Fifth Avenue, which is now Exhibit 68? A. Whatever that testimony is, is the way it should be, or the way I answered.

The Court: He knows what you answered. He wants to know if you were mistaken or not.

The Witness: No, sir.

Q. I now understand you to say that not all the signatures on Exhibit 68 are in your handwriting? A. As far as I recollect, they are, yes, sir.

892

*Percy Campbell Mason—for Government—Cross*

Q. Were you mistaken or did you testify untruthfully at the last trial when you said that not all of the signatures "T. R. Johnson" on here were your handwriting? A. No, sir, the testimony that I gave before was all proper testimony.

Q. That is, that one of these signatures on Exhibit 68 was not your handwriting? A. If that is the testimony, yes, sir.

893

Q. I want you to read it, sir, page 434, direct examination by Mr. Reis, beginning with the question: "Q. Now I show you a document for room space." Will you read the following three questions and answers? A. No, sir, that is correct, as far as I recollect.

Q. You say that whatever occurred, that you did not sign all the names "T. R. Johnson" on Exhibit 68, is that correct? A. Yes, sir.

Q. Now will you look at this Exhibit 68 again and tell me— A. That is not—

Q. That is not what, sir? A. Is that the application?

The Court: Did you sign those or not?

The Witness: Yes, sir.

894

The Court: The three signatures on there, did you sign them all?

The Witness: I would not be positive about it.

The Court: What is your best recollection, looking at them?

The Witness: The way I testified was the proper testimony. I had it fresh in my mind then.

The Court: Let me see those.

Mr. Fennelly: Yes (handing to the Court).

The Court: All right.

Q. So you were mistaken then when you said that all signatures on Exhibit 68 and the words "T. R. Johnson" are your handwriting, is that correct? A. Yes, sir.

Mr. Reis: I do not think I asked him for all the signatures, but I asked him if he signed the application.

The Court: No, the three "T. R. Johnsons" you asked him.

Mr. Fennelly: I think he asked about all of them. He testified that is—

The Witness: I am not sure about it. It is the final signature.

Q. Let's take a look at them starting from the top. I asked you alongside the words "Firm name, T. R. Johnson," was that in your handwriting? A. No, I do not think so. That is not the way I make a "T" or a "C" or an "E." No, sir, the last testimony was the correct testimony.

Q. So you now say that is not your handwriting, is that correct? A. Yes, sir.

Mr. Reis: As to what signature?

Mr. Fennelly: As to the "T. R. Johnson" alongside the words "Firm name."

Mr. Reis: All right.

Q. Alongside the printed words "Bulletin Listing," and thereunder "T. R. Johnson," will you look at them and tell us whether that is in your handwriting? A. No, sir, I do not think it is.

Q. Alongside the word "Tenant," the signature? A. Yes.

Q. You are sure about that? A. Yes.

Q. Would you be good enough to write "T. R. Johnson" down here in three separate places? A. Johnson?

Q. Johnson. A. (Witness complies.)

Mr. Fennelly: Will you mark that for identification, please?

898

*Percy Campbell Mason—for Government—Cross*

(Marked Defendant's Exhibit D for Identification.)

Q. I show you again Government's Exhibit 19 and ask you again—whether or not the endorsement "T. R. Johnson," whether or not it is in your handwriting? A. Yes, sir.

Q. No doubt about that? A. No.

Q. Also Exhibit 17, the endorsements on that check "T. R. Johnson," is that in your handwriting? A. Yes, sir.

899

Q. No question about that? A. No.

Mr. Fennelly: Have you got the Wilson check?

Mr. Reis: Is that what you mean? There are two of them (handing to Mr. Fennelly).

(Discussion between counsel off the record.)

Q. Referring to Exhibits 17 and 19, the checks of Watson & White, to the order of T. R. Johnson, didn't you once tell an F. B. I. man that Turley's brother-in-law, Finn, typewrote this endorsement on there? A. No, I do not think I did.

900

Q. Didn't you admit at the last trial that you had told the F. B. I. man that Turley's brother-in-law, a man named Finn, had—

Mr. Reis: Whose endorsement is on there?

Q. You told the F. B. I. agents that story, isn't that true? A. No, not exactly that way. They asked me who was there in the office. I said Jack Finn was there.

Q. Didn't you testify at the last trial that you had told the F. B. I. that Turley's brother-in-law had typewritten this endorsement on there "Robert C. Wilson," and you admitted at the last trial, did you not, that you had told



*Percy Campbell Mason—for Government—Cross*

901

the F. B. I. about it? Isn't that so? A. No, sir, that did not come up, I do not believe.

Q. Mr. Finn did not typewrite this endorsement, did he? A. That is what I do not know. I do not think so.

Q. You really know that he did not, don't you? A. No, I do not know that he did not.

Q. You do not know who did typewrite that, do you? A. No, sir.

Q. When you told the F. B. I. that Finn had done it you were mistaken? A. I did not make a positive assertion.

902

Q. Do you remember being asked these questions on direct examination by Mr. Reis:

"Q. Mr. Mason, do you know who typewrote the name Robert C. Wilson on this check? A. I do not.

"Q. Do you recall when I questioned you originally you told me it was Jack Finn, Mr. Turley's brother-in-law? A. Yes, sir, I thought it was Jack Finn."

Q. And then later on in my examination did you admit that you were mistaken? A. Yes, sir.

"Q. You do not know who did that typewriting? A. No, sir."

Q. Do you remember that testimony? A. Yes, but there are so many things balled up there, but it was open to explanation.

903

Q. But you did so testify, did you not, at the last trial? A. Yes, sir.

Q. Didn't Blaser & Ingalls owe Turley the sum of \$900 or over \$900 which they had taken? A. Yes, sir.

Q. Didn't you tell them that they had stolen it from Turley? A. No.

Q. In substance? A. I told them they had gotten away with it, yes.

Q. Where were you in January and February of 1937? A. I was in Florida in February.

904

*Percy Campbell Mason—for Government—Redirect.  
Joseph D. Milenky—for Government—Direct*

Q. When did you go there? A. The early part of the month, and got back the last of the month.

Q. When was it that you went into the office with a man named Jacobson, Herbert Jacobson? A. From April to October.

Q. Hadn't you been in his office with him before that? A. No, sir, from about April to October.

Mr. Fennelly: That is all.

905

*Redirect examination by Mr. Reis:*

Q. Mr. Mason, what were you doing last year, what had you been doing? A. Trading in chemicals and steel products, and things of that kind.

Q. Who had you been associated in business with? A. Jacobson.

Q. Herbert Jacobson? A. Yes.

Q. You have had an opportunity to discuss this with Jacobson, haven't you? A. Never discussed anything with Jacobson in connection with the case.

Mr. Reis: That is all.

906

(Witness excused.)

JOSEPH D. MILENKY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Reis:*

Q. Mr. Milenky, what is your occupation? A. I am a Special Agent of the Bureau of Investigation.

*Joseph D. Milenky—for Government—Direct*

907

Q. For how long? A. I am in my twelfth year.

Q. Did you arrest one Chester G. Bollenbach? A. I did.

Q. When? A. On September 7, 1939.

Q. Where did you arrest him? A. In front of 40 Wall Street, New York, New York.

Q. Where did you bring him to? A. We brought him to this building or office.

Q. At the time that you brought him to this office was there anyone present with him? A. Special Agent John J. Keating was with me. We both arrested him. He was alone at the time of his arrest.

908

Q. What floor did you bring him to here? A. The sixth floor.

Q. Did you question the defendant? A. Yes, sir, I did.

Q. What day did you question him? A. I questioned him on September 7, 1939, and also questioned him on September 8, 1939, and on several occasions in between and subsequent thereto.

Q. On the occasion of the examination on September 7, 1939, was there a stenographer present? A. There was.

Q. When you again examined him, this defendant, on September 8, 1939, was there a stenographer present? A. Yes, sir, there was.

909

Q. Do you recall when the defendant was shown these statements, to read the transcripts? A. The statement which he made on September 7th, 1939, he signed on September 21st, 1939. The statement that he made on September 8th, 1939, he signed on September 22nd, 1939.

Mr. Femelly: We concede that he signed both of them, your Honor.

Q. I show you these statements. Are those his initials on each page, and signature at the end? A. This September 7, 1939, that is the statement that he signed.

910

*Joseph D. Milenky—for Government—Direct*

Q. Did he initial every page? A. He initialed every page.

Q. Go ahead.

The Court: Are there two statements?

Mr. Reis: Two statements.

The Witness: Yes, sir, he initialed every page. On the statement of September 8, 1939 he affixed his signature at the bottom of that last page, page 16.

Q. What date? A. September 22, 1939.

911

Mr. Reis: I offer both of these in evidence.

Mr. Fennelly: I have no objection, your Honor, in so far as it pertains to the subject matter in this case. I object to it in so far as it pertains to matter outside the case.

The Court: As you read it, if there is any point where you want to make an objection, you may do so. Do you make the general objection?

Mr. Fennelly: Yes.

The Court: I overrule the general objection.

Mr. Fennelly: Exception. I think that specifically covers the objection.

912

(Two statements marked Government's Exhibits 69 and 70.)

Mr. Reis: May I have Mr. Milenky read the questions and answers?

The Court: We will suspend for a few minutes.

(Short recess.)

(In the absence of the Court and jury the following occurred:)

Mr. Reis: Mr. Major, will you dictate the bond numbers to the reporter?

*Colloquy of Court and Counsel*

913

Mr. Major: Yes. December 17, 1935, 15406 to 15410, inclusive; 15416 to 15420, inclusive, General Theatre Equipment 6's, 1940;

On December 16, 1935, 15789 to 15798, inclusive, 10 bonds, General Theatre 6's, 1940.

(The following proceedings were had in the presence of the Court and jury.)

Mr. Reis: May I have Mr. Milenky read the questions and answers in Exhibit 69?

Mr. Fennelly: I think Mr. Reis should read them. They are in evidence.

914

The Court: It does not make any difference.

The Witness: This statement is dated New York, New York, September 7, 1939, Statement of Chester G. Bollenbach.

The Court: That is exhibit what?

Mr. Reis: 69.

The Court: The first statement?

Mr. Reis: Yes, sir. Statement of Chester G. Bollenbach,—Statement of the defendant Chester G. Bollenbach, made to Special Agents John J. Keating and Joseph D. Milenky, Federal Bureau of Investigation.

915

(Mr. Milenky reads Government's Exhibit 69 to the jury.)

(At one point during the reading of the statement the following occurred:)

Mr. Fennelly: I take it that you overrule my objection and I have an exception to all of this?

The Court: Yes.

(Mr. Milenky continues and completes the reading of Government's Exhibit 69 to the jury.)



916

*Colloquy of Court and Counsel*

The Witness: This was signed by Chester G. Bollenbach on September 21, 1939. Before he signed this statement he conferred with his attorney, Mr. Samuel Hershenstein.

Mr. Fennelly: I object.

The Court: Was this in your presence?

The Witness: Yes, sir, he advised him to sign this statement and advised him to cooperate freely.

Mr. Fennelly: I object to it, your Honor. I move for the withdrawal of a juror and a mistrial.

917

The Court: Denied.

Mr. Fennelly: Exception.

Q. Was there a further statement taken? A. Yes, the following day.

Q. Will you read that statement? A. May I have it?

Q. It is attached to that one. A. No, it is not.

Mr. Fennelly: Here it is, Exhibit 70.

(Mr. Milenky reads Government's Exhibit 70 to the jury.)

918

The Court: How much bail has this defendant?

Mr. Fennelly: Originally \$2,500. In view of the fact that there was a delay and we carried the case over, in 1940 there was an application made for a reduction.

The Court: How much is it now?

Mr. Reis: \$1,500.

The Court: I am inclined to commit him in view of his statement, unless you ask that he be continued on bail. Do you wish to assume the responsibility?

Mr. Reis: I do not.

Mr. Fennelly: Would your Honor hear me on the subject?

The Court: Yes.

Mr. Fennelly: This man has been indicted now for some, I think, it is three years.

The Court: Yes.

Mr. Fennelly: He has been available on every occasion. He is married. He has a small daughter. There is no possibility of the man, as I see it, running away. I do not think your Honor ought to raise his bail or remand him. He has been here all the time. I do not think there is the slightest—

The Court: On this state of the record I would not assume the responsibility of letting him out unless the District Attorney consents. 920

Mr. Reis: No, I won't consent.

The Court: From his confession it is so clear that I cannot continue him on bail without the consent of the United States Attorney.

Mr. Fennelly: It is known that he has made this statement. The point is that he was not out in Minneapolis.

The Court: His claim is that he did not commit this crime, but is guilty of something else.

Mr. Fennelly: Exactly. 921

The Court: I understand his position.

What do you say, Mr. Reis?

Mr. Reis: I won't assume responsibility. I think he forgot just exactly what he did confess. This is the first time that he swears to what he said.

The Court: I will commit him.

Mr. Fennelly: I need this man to prepare his defense. If you insist on remanding him, he has no opportunity to prepare his defense.

The Court: I will remand him, on the state of the record.

922

*Motion to Dismiss*

Mr. Fennelly: He has no opportunity to prepare his defense.

The Court: He will be remanded, on the state of the record.

New York, November 30, 1942;  
10:30 A. M.

## TRIAL RESUMED

923

JOSEPH D. MILENKY, resumed the stand.

Mr. Reis: That is all with this witness.

Mr. Fennelly: No cross examination.

Mr. Reis: The Government rests.

Mr. Fennelly: Before we go on, your Honor, I want to move—to take an exception to your Honor's ruling remanding the defendant, and also move for the withdrawal of a juror and a mistrial on the ground that that prejudiced the defendant and makes it impossible for him to have a fair trial.

924

The Court: The jury doesn't know anything about it, and even if they do it makes no difference. I deny the motion.

Mr. Fennelly: I move for a dismissal of the indictment and the direction of a verdict for the defendant on the ground that there is no evidence before the jury from which beyond a reasonable doubt they could find the defendant guilty of the crime charged.

In connection with the substantive count, and it applies equally well with the conspiracy, I would like to call your Honor's attention to this: The proof in the case shows that in a bankruptcy proceeding

claims were filed and these bonds attached. That these claims were allowed in that proceeding and that therefore any claim on the bonds—any value it had in itself is merged in the proof of claim, just the same as if I had a promissory note and sued on it, that note is merged in the judgment, and thereafter I could no longer sue on the note; it becomes of itself valueless. The only thing that then has value is the judgment. So that, in this case, whoever bought these things were mistaken as to their value, because they could not claim anything on them from the Minnesota & Ontario Paper Company, because a claim in a bankruptcy proceeding had already been accepted by the Court. So that whatever value that thing had was merged in that claim, and if anybody assumed it had value—it had no value any more than an ordinary promissory note which has been reduced to judgment. So, naturally, the thing is valueless, even though someone thought that they might have value, because they could not collect on them from the government. And anybody who would buy them would buy them through a mistaken belief that they had value. But, they had no value except what anybody would receive in the reorganization proceedings.

926

927

Now, in addition, on the conspiracy count, there is not any overt act charged prior to the time that these bonds, according to the evidence in the case, arrived in New York. And since the object of the conspiracy under this particular statute had been consummated when these bonds arrived in interstate commerce in New York, that only is the offense, and people cannot themselves conspire to extend an offense beyond what the statute makes an offense. The statute makes it an offense solely to transport

them or cause them to be transported in interstate commerce, and once the bonds arrived in the final which was New York in this case, the object of the conspiracy has been consummated. And there are no overt acts charged in this indictment prior to the time that the evidence shows the bonds were here. The first in date is February 3, which was after the event. For those reasons, your Honor, I ask that you dismiss the indictment and direct a verdict.

The Court: The motion is denied.

Mr. Fennelly: Exception. I would like to move to strike out all testimony of similar acts.

The Court: I think you made your motions during the trial.

Mr. Fennelly: I just wanted to be sure that the record is complete.

The Court: The motion is denied. Exception.

Mr. Fennelly: And also to strike out all evidence as to these transactions subsequent to the arrival of the bonds in New York.

The Court: All right. Motion denied.

Mr. Fennelly: I respectfully except. It is stipulated that from the transcript of the record in the United States vs. Turley, trial from December 4th on, that Jane Tryon was asked the following questions:

"Q. Did you ever rent out space to a man by the name of Berendson around February 1st, 1937? A. Yes, sir."

Mr. Reis: Yes.

Mr. Fennelly: And further it is stipulated that in the testimony given by Chell Smith on the trial of the United States vs. Turley, et al., that the following question was asked and the following answer given:



"Q. You say the man was there in January, the latter part of January or the first part of February? A. It was on the first of February."

It is also stipulated that George R. Tryon, if called, would testify he rented out space to one Arnold Berendson in the first part of February, 1937, at premises 15 East 40th Street, but if called would not be able to remember what the man looked like. That he would testify that he is (George R. Tryon) about 76 years of age.

932

(At this point the jury returned to the court room.)

PETER W. BURNS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Fennelly:*

Q: Mr. Burns, you are a defendant named in the indictment, are you not? A. Yes, sir.

Q. On which Mr. Bollenbach is now on trial? A. Yes, 933  
sir.

Q. And you were tried and convicted, were you not?  
A. Yes, sir.

Q. About last November or December, 1941?

Mr. Reis: It was in January, 1942.

The Witness: That is right.

Q. Now in the late part of 1936 or in January of 1937 did Mr. Bollenbach receive mail in an office that you occupied? A. Yes.

Q. And he had been receiving mail in that office before you ever went into the office, did he not, as a tenant? A. I would say since about 1930.

Q. And he had been in there before, receiving mail there, before you came into the office? A. Before I took charge of the office.

Q. Where was that office? A. 15 William Street.

Q. Now, some time in the latter part of 1936 or in January of 1937 did you go on a trip? A. Yes, sir.

935 Q. About when was it that you left New York? A. About November, November, 1936.

Q. Will you tell us where you went? A. I went to Philadelphia, Baltimore, Washington, Richmond, Norfolk and several cities in North Carolina, Georgia, Alabama, Louisiana, Texas, Oklahoma, Missouri, Chicago, and then Minneapolis.

Q. And at that time what was the nature of your business? A. I was in the list business. I am still in it.

Q. That is selling lists? A. Selling of stockholders' and bondholders' lists.

Q. How long have you been in that business? A. A little over ten years.

936 Q. Now about when was it you were in Minneapolis, do you recall, on that trip? A. The record here says I was there about January.

Q. Of 1936?

Mr. Reis: I submit that it is not responsive, what the record says.

The Court: Yes.

The Witness: I was refreshed by the records here.

The Court: January, 1937?

The Witness: January, 1937.

Q. Now how long did you stay in Minneapolis? A. At least two weeks.

Q. And where did you live when you were there? A. At the Hotel Nicollét.

Q. Did you register in your own name? A. Yes, sir.

Q. While you were in Minneapolis did you ever go to the United States District Court? A. Yes.

Q. And on how many occasions did you go to the United States District Court? A. Oh, about three or four times.

Q. And on those three or four times how long did you stay—Withdrawn. You say three or four times. Do you mean three or four different times? A. Yes, sir. 938

Q. How long did you stay in the court house each day that you went there? A. Maybe an hour or two hours. I used to go there around lunch time when people I was calling on would be out to lunch.

Q. What part of the court house did you go to, the clerk's office? A. The clerk's office, yes.

Q. Did you look at dockets and papers there? A. Yes.

Q. Now was Mr. Bollenbach in Minneapolis to your knowledge? A. No, sir.

Q. At any time in January of 1937? A. No, sir.

Q. And had you ever told Mr. Bollenbach before you went that you were going to Minneapolis? A. No, sir. 939

Q. And had you talked to him at any time about your going on this trip? A. No, sir.

Q. When you were in that clerk's office in Minneapolis in 1937 did you see any women clerks? A. Three of them.

Q. You saw them every day you were there? A. Yes, sir.

Q. Did you inquire of them about the dockets and records you wanted to see? A. I did the first time and they said "Just go and help yourself."

940

*Peter W. Burns—for Defendant—Direct*

Q. Now when was it that you returned from Minneapolis—I will withdraw that. Did there come a time that you returned from Minneapolis to New York? A. Yes, at the end of January.

Q. Can you fix the day that you returned? A. Yes, January 30th.

Q. Was it the 30th or 31st? A. Perhaps it is the 31st. The records show it is the 31st, I believe.

Mr. Reis: What records are you talking about?

941

The Witness: They are looking over the records of my previous trial.

Mr. Reis: How do you know that?

The Witness: I imagine that is what they are doing.

The Court: Don't imagine.

Q. Was there some event that you refresh your recollection from about as to the date that you arrived in New York on that trip? A. Yes, it was on a Sunday, and that is the day I usually visit my mother who is in a hospital on Long Island, and we looked up the records.

942

The Court: Who is "we"?

The Witness: My attorney and myself, we looked at the records at the hospital and determined the day I visited there.

Q. And that was the 31st of January, was it not, 1937? A. Yes, either the 30th or the 31st. I don't remember now, but it was on a Sunday.

Q. Now at any time prior or during that trip had you ever spoken a word to Mr. Bollenbach on the subject matter of the Minnesota & Ontario bonds? A. No, sir.

Q. Have you any recollection of when you saw Mr. Bollenbach after you returned to New York at the end of Janu-

ary, 1937? A. No, I have not. All I know is I may have seen him a week later or perhaps two weeks later.

Q. You testified, did you not, on the trial where you were a defendant? A. Yes.

Q. And at the time you testified Mr. Bollenbach was not a defendant on trial? A. That is right.

Q. And you testified at that time, did you not, that you were out on this trip and in Minneapolis and in the United States clerk's office in Minneapolis, did you not? A. Yes, sir.

*Cross examination by Mr. Reis:*

Q. Have you a scar on your face? A. Yes.

Q. Let us see it. A. (Witness points to scar.)

The Court: Go over and show it to the jury.

(Witness does as directed.)

Mr. Reis: Indicating scar on the right side of the face like a knife mark?

The Witness: Yes.

Q. You testified in the last trial in which you were convicted? A. That is right. 945

Q. I show you transcript of your testimony. Show me any place where you said you had a conversation with any clerk in the court house at Minneapolis?

Mr. Fennelly: That is objected to.

A. You didn't ask me.

Q. Did you testify on the last trial whether or not, either under my examination or your attorney, that you had a conversation with any clerk in the United States Court in Minneapolis?



946.

*Peter W. Burns—for Defendant—Cross*

Mr. Fennelly: I object to it because it doesn't appear that he was ever asked the question.

The Court: Overruled.

A. I would like to have that question again.

Q. (Read.) A. I don't believe so.

The Court: Were you asked about it?

The Witness: No.

947

Q. You were asked whether you were in the clerk's office? A. Yes, Judge Knox asked me that.

Q. And you said you were? A. Yes.

Q. This is the first time you ever testified you ever had any conversation in the United States District clerk's office?

A. I can do better than that. I can tell you whether the girls were married or not.

Q. You have learned a lot since you were convicted?

A. Yes, sir.

Q. You discussed this matter with Mr. Bollenbach? A. Yes, sir.

Q. And you have seen the transcript of the former trial?

948

A. Yes, sir, I have had the minutes.

Q. And you have read the minutes? A. That is right.

Q. I show you Exhibits 43, 27 and 32. Did you ever see these before? A. No, I never saw these before. Mr. Milenky gave me that in conversation.

Q. Just answer my questions. Those are letters signed by Arnold Berendson? A. I didn't look at the signatures.

Q. Look at the signatures (handing)? A. I have never seen these letters before.

Q. Did you ever have lunch with Jacobson, Turley and Bollenbach in Schwartz's restaurant some time in 1936?

A. No, sir.

Q. If I were to tell you that according to a confession made by Bollenbach he stated you and Jacobson and Turley had a meeting in Schwartz's restaurant, would that change your answer? A. No, sir.

Q. Were you ever in Wilmington, Delaware, with Bollenbach? A. No, sir.

Q. Did you ever dispose of 20 bonds stolen from the clerk of the Chancery Court in Wilmington, Delaware? A. No, sir.

Q. And if Bollenbach in his confession said you did, would that refresh your recollection? A. No, sir.

950

Q. You deny it? A. I deny it.

Q. You deposited \$1200 in cash on or about February 15, 1937? A. Yes, Mr. Reis.

Q. How long did you keep that cash in your pocket? A. Well, I had \$500 when I left.

Q. How long did you keep \$1200 in cash in your pocket? A. I didn't have \$1200 at one time at any time.

Q. Didn't you come back to New York February 1st, 1937? A. That is right.

Q. And didn't you testify in the last trial that you had \$1200 when you came back to New York? A. I did.

Q. And didn't you testify that you kept that \$1200 in cash in your pocket from February 1st to February 15th? 951

A. It was probably a little bit more than that.

Q. I show you your transcript of account for 1937 and ask you if any deposits were made between the 1st and the 14th of February? A. I didn't make—

Q. Were deposits made between the 1st and the 14th of February? A. There were probably deposits made every day.

Q. I show you Exhibit 62 and ask you if that is a transcript of your bank account? A. I believe it is.

Q. Look at the deposits for February? A. Yes, that is right.

Q. Were there deposits on the 2nd? A. The 2nd of what?

Q. February? A. Yes.

Q. What are the dates before the 14th or 15th on which deposits were made? A. The 14th.

Q. Here are the dates of the deposits. A. Well, there is an item of \$19.50, \$110.50, and it runs on to \$1200 on the 15th.

Q. That was on a Monday? A. They dated it Monday but I put it in Saturday.

Q. Friday the 12th was Lincoln's Birthday and the bank was closed? A. I imagine so, that is right.

Q. Is this the deposit ticket you entered, Exhibit 63, for \$1200 cash? A. Yes, that's my handwriting.

Q. You never entered that in your stub book? A. I never enter anything in the stub book.

Q. You never entered the \$1200 deposit? A. The young lady did.

Q. Suppose she said she knew nothing about it? A. I can show you the stub which I found since my last trial. And I found a lot of other things.

Q. You had them available at your last trial? A. No, you had all my cancelled checks and you have never returned them.

Q. When were they taken from you? A. Mr. Milenky took them from me at the time he picked me up.

Q. He took cancelled checks from you? A. Yes, sir.

Q. And you never got a receipt for them? A. That is right, and you still have a lot of securities of mine that have never been given back.

Q. You came up with Julia Bauer Monday? A. Yes, sir.

Q. And you had a talk with Bollenbach and Miss Bauer, didn't you—You are out on bail pending appeal? A. Yes, sir. There happen to be a handful of securities belonging

to somebody in New Hampshire and I have not asked for them yet because I don't want to mess the trial up.

The Court: You stop talking and just answer questions, will you?

Q. Do you remember getting property back from Mr. Milenky and Mr. Keating, of the F. B. I.? A. Yes.

The Court: Did you take these bonds from the clerk's office?

The Witness: No, sir.

The Court: You didn't take them?

The Witness: No, sir.

The Court: You didn't steal anything from the clerk's office?

The Witness: No, sir.

The Court: That is, in Minneapolis?

The Witness: In Minneapolis or any other place.

Q. I show you five pages and ask you if those are your signatures. Just look on each page and tell me if those are your signatures on each page? A. There is the signature. Yes, they are.

Q. All of them are signed by you? A. Yes.

Q. Read what you signed? A. That I received the property. That is so, but I didn't get it all.

The Court: Just read it.

Q. Received the property and signed by who? A. By myself.

Q. What date is that? A. September 11, 1935.

Q. Is that the date you were arrested? A. That is probably a couple of days later.

958

*Peter W. Burns—for Defendant—Cross*

Q. Show me. Is this a list of the property that was returned to you? A. I guess so. Just a second. I can't read it. A billfold containing \$10. Yes, this is stuff that was returned to me.

Mr. Reis: I offer this for identification as one exhibit.

(Marked Government's Exhibit 71 for Identification.)

959

Q. If I call your attention again to the fact that Mr. Jacobson and Mr. Bollenbach both state that you were in the restaurant with them and George Turley, do you still deny it? A. I still deny it.

Q. Did you go to Manning & Company? A. I did.

Q. How many times have you been in George Turley's office since 1937? A. 25 or 30 times.

Q. Do you know Campbell Mason there? A. I saw him there.

Q. Did you ever conduct a place at 15 East 49th Street? A. No, sir.

960

Q. Did you ever draw \$50 in cash from the bank and give it to Jacobson to pay an attorney named Getz? A. No, I don't know anything about that at all.

Q. Do you remember testifying at the last trial that you never kept any books of account? A. Yes.

Q. You didn't, did you? A. Well, I tried to explain at the time.

Q. Did you keep any books of account in your business in January and February, 1937? A. We kept a check book.

Q. Did you keep a ledger, journal and cash book? A. No, but we kept a duplicate of every bill we sent out and in the check book we would mark where the check came from and the addresses of the people they came from.



Q. In the last trial you were given an opportunity to produce those check books? A. Yes.

Q. Did you produce them? A. No, I thought you had them but I found one of them.

Q. Did you ever make the statement that the F. B. I. or the United States Attorney's office had your cancelled checks and your check book? A. Yes.

Q. You say you did say that? A. I don't know just what you are driving at.

Q. (Read.) A. I probably did; I don't recall.

Q. Look at your testimony and tell me where you made that statement? 962

Mr. Fennelly: I object to that. Was he ever asked that?

The Court: He says he testified to it.

Q. Read your testimony. A. Do you want me to read all this?

Q. Point out where you made that statement.

The Court: Did you make the statement?

The Witness: I don't remember making that statement. I do remember telling it to my attorney.

The Court: That is not the point. Was that before Judge Knox? 963

The Witness: Yes, sir.

The Court: Did you say it, did you testify to it?

The Witness: I don't remember saying that in open court.

Mr. Fennelly: Was he ever asked the questions?

The Court: Were you asked about it?

The Witness: I don't recall that.

964

*Jacob S. Bollenbach—for Defendant—Direct*

Q. As a matter of fact you didn't testify to that, did you? A. Probably not.

Q. As a matter of fact you or your attorney never made any demand upon anyone in the United States Attorney's office to look at these records while preparing your defense? A. We asked Mr. Milenky—

Mr. Fennelly: I object as immaterial and irrelevant.

The Court: Overruled.

965

The Witness: Senator Simpson told me he asked Mr. Milenky for them. That is what he told me and I remember that.

The Court: Was he your lawyer?

The Witness: Yes, sir, and he told me that Mr. Milenky told him he had no check books but had some cancelled checks of mine.

Q. He told you we had some stocks and bonds found in your office? A. Yes.

Q. But there was no talk about checks or check book? A. Yes, there was because we wanted to look up some items there.

966

Q. You never testified to that in the last trial, did you? A. I wasn't asked that.

(Witness excused.)

JACOB S. BOLLENBACH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Fennelly:*

Q. Mr. Bollenbach, you are a brother of the defendant Chester Bollenbach? A. Yes, sir.

*Jacob S. Bollenbach—for Defendant—Direct*

967

Q. Do you recall whether or not in about February 1st, 1937, you made any trip anywhere with your brother Chester? A. The exact date I am not positive of but it was on a Sunday and we started for Shamokin, Pennsylvania.

(Marked Defendant's Exhibit E for Identification.)

Q. How did you go there? A. By automobile.

Q. Was anyone along besides you and your brother?

A. No, sir.

Q. Did you stay at any hotel there? A. Yes, sir.

968

Q. Do you recall the name of the hotel? A. I am not positive, but I think it was either the Greymore or Grey-something.

Q. I show you Exhibit E for Identification and ask you to look at it and say whether or not it refreshes your recollection as to the name of the hotel you stayed at? A. That is the name of the hotel.

The Court: What is it?

The Witness: Graemer.

Q. Hotel Graemer, Shamokin, Pennsylvania? A. Yes,

969

Q. And if you will look at that letter and tell us whether or not that refreshes your recollection? Just read the first paragraph, as to the date you went down there. A. Yes, we started off in the afternoon.

Q. What day of the month? A. On a Sunday we started.

The Court: What month?

The Witness: Well, the letter says February 1st.

The Court: Does that refresh your recollection?

970

*Jacob S. Bollenbach—for Defendant—Cross*

The Witness: As far as the date is concerned, this date must be correct because I didn't make any record of going on that particular day. I knew my brother had written a letter that date and February 1st is right.

Q. And you stayed overnight in the hotel, did you? A. Yes, sir.

Q. Where did you go after you left there? A. We came back to New York.

971

Q. And did you attend any business out there or did your brother attend to any business? A. He went to the stockholders' meeting in Fuhrman Smith Brewing Company.

*Cross examination by Mr. Reis:*

Q. Who signed the register at the hotel? A. How is that?

Q. Who signed the register in the hotel? A. My brother.

Q. Have you got the register here do you know; has the hotel brought it here? A. I couldn't say.

972

Q. Did you go down and make the inquiry yourself?

Mr. Fennelly: I was informed that they were burned, Mr. Reis. I will give you the letter from the hotel if you would like it.

*Dorothy H. Bollenbach—for Defendant—Direct*

973

DOROTHY H. BOLLENBACH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Fennelly:*

Q. Mrs. Bollenbach, you are the wife of the defendant Chester Bollenbach? A. Yes, sir.

Q. I show you Defendant's Exhibit E for Identification, this letter, and ask you to look at it and tell me whether or not you received it? A. I did receive it.

Q. Did you receive it in the United States mail? A. 974 Yes, I did.

Q. Did you receive it—don't be nervous now—

Mr. Fennelly: I offer the letter in evidence.

Mr. Reis: No objection.

(Government's Exhibit E for Identification now received in evidence.)

(Letter and envelope shown to the jury by Mr. Fennelly.)

Q. Now, during the month of January, 1937, was your husband, so far as you can recall, away from home? A. 975 I don't remember that he was ever away in the month of January.

Q. Will you speak up? A. I don't recall if he was away in the month of January.

Q. Now at any time when he took a trip how did he go, what means of conveyance did he use? A. By automobile.

Q. And do you recall him ever being away on any trip that he took for more than one night? A. I do not. One night or two days at the most.



976. *Joseph D. Milenky (Recalled)—for Government—Direct*

Q. And when he returned he returned in his car, and when he left he left in his car, is that right? A. That is right.

Q. During January of 1937, to the best of your recollection, he was at home? A. He was at home. I don't remember any time he went away.

(No cross examination.)

977

Mr. Fennelly: I offer in evidence, your Honor, certified copy of an order respecting claims and the interest of creditors and stockholders in the matter of the Minneapolis & Ontario Paper Company. This is dated the 31st of October, 1934.

Mr. Reis: All right.

(Marked Defendant's Exhibit F in Evidence.)

Mr. Fennelly: I wonder if your Honor would ask the reporter to read the stipulation we entered into to the jury?

The Court: Yes.

(The reporter read the stipulation referred to.)

978

Mr. Fennelly: The defendant rests.

JOSEPH D. MILENKY, recalled.

*Direct examination by Mr. Reis:*

Q. Mr. Milenky, did you arrest Peter W. Burns? A. I did, with other agents.

Q. When? A. On September 8th, 1939.

Q. At the time of his arrest and incidental to his arrest did you search the premises? A. I did.

*Joseph D. Milenky (Recalled)—for Government—Direct* 979

Mr. Fennelly: Objected to as immaterial and irrelevant.

The Court: Overruled.

Q. Can you tell without looking at your records what property you took from the possession of Peter W. Burns at that time? A. Just generally, not specifically.

*By the Court:*

Q. Did you give him a receipt for what you took? A. Yes, sir. 980

Q. Have you got it here? A. Yes, sir.

Q. Does that include everything? A. Included in this receipt are certain stock certificates and probably one or two other papers, letters, which are not included in this receipt.

*By Mr. Reis:*

Q. Did you ever take any cancelled vouchers or check books or stubs from Burns which you did not return? A. I did not, sir.

Mr. Reis: I offer this receipt in evidence. 981

Mr. Fennelly: Objected to as immaterial and irrelevant.

The Court: It will be received.

(Marked Government's Exhibit 71 in Evidence.)

(No cross examination.)

Mr. Reis: The government rests.

The Court: Both sides rest?

Mr. Fennelly: Both sides rest, your Honor.

The Court: All right.

982

*Motions to Dismiss—Denied*

Mr. Fennelly: I would like to make some motions and suggest that your Honor excuse the jury.

The Court: I would rather go right ahead. We have had a number of recesses.

Mr. Fennelly: Could we come back at half past one? I want to renew my motions made at the close of the case, at the close of the government's case and also move for a directed verdict now.

The Court: The motions will be denied.

Mr. Fennelly: I respectfully except.

983

(Recess until 1:30 P. M.)

(AFTERNOON SESSION.)

1:30 P. M.

(Mr. Fennelly summed up the defendant's case to the jury.)

(Mr. Reis summed up the government's case to the jury.)

984

Mr. Fennelly: I want to take an exception to the summation of the prosecutor where he said that the defendant had in effect, that we had stigmatized the case by committing perjury. That is not true.

I also take exception to his remark that the defendant had been in a similar transaction two or three times eight or nine years ago.

The Court: It is the jury's recollection of the testimony that will control.

## Charge of the Court

985

(Moscowitz, J.)

The Court: Members of the Jury: The defendant Chester G. Bollenbach and others, that is, George A. Turley, Chester G. Bollenbach, alias Walter T. Roberts, alias Mr. Brown, Peter W. Burns, alias Arnold Berendson, Herbert G. Jacobson, Fred Blaser and Ernest D. Ingalls, were indicted by the Grand Jury on two counts. The first count charges that on or about January 1, 1937, up to and including February 8, 1937, both dates inclusive, the exact date being to the Grand Jurors unknown, this defendant, and the others whose names I have read to you, did unlawfully, wilfully and knowingly transport and cause to be transported in interstate commerce, securities of the value of \$5,000 and more, which had theretofore been stolen, knowing the said securities to have been so stolen, that is to say, that the defendants did transport and cause to be transported from the City of Minneapolis, Minnesota, to the City, State and Southern District of New York and within the jurisdiction of this Court, securities of the value of \$5,000 and more, to wit, twenty-five \$1,000 Minnesota & Ontario Paper Company gold notes, interest rate 6%, due March 1, 1931, having the serial numbers 1021, 1022, and here the numbers are given, which securities had theretofore been stolen from the office of the Clerk of the United States District Court in Minneapolis, Minnesota.

986

987

That the defendants, at the time and place aforesaid, did transport and cause to be transported the stolen securities in interstate commerce as aforesaid knowing the same to have been so stolen. That is the first count of the indictment.

The second count charges that commencing on or about January 1, 1937 and continuing up to January 1, 1938, at the Southern District of New York and within the jurisdic-

tion of this Court, these people, including the defendant, did unlawfully, knowingly and wilfully combine, conspire, confederate and agree together and with each other and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States. That is, to violate Section 415, Title 18, United States Code. That as a part of the conspiracy that after the bonds had been stolen from the office of the Clerk of the United States District Court in Minneapolis, Minnesota, the defendant would cause to be transported in interstate commerce, 25 Minnesota & Ontario Paper Company gold notes, 6%, due March 1, 1931, of the value of \$5,000 and more, to the City, State and Southern District of New York, and within the jurisdiction of this Court, knowing the same to have been so stolen.

989

Then follow five overt acts:

First, in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about February 3, 1937, George Turley had a conversation with Fred Blaser and Ernest Ingalls at George Turley's law office, located at 521 Fifth Avenue, in the City and State of New York.

990

2. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, Fred Blaser and Ernest Ingalls had a conversation with Chester Bollenbach at the office of Blaser & Ingalls, 32 Broadway, in the City and State of New York, on or about February 5, 1937.

3. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about



*Charge of the Court.*

991

February 11, 1937, Blaser, Ingalls, Bollenbach, Turley and Burns had a conversation at George Turley's law office, located at 521 Fifth Avenue, in the City and State of New York.

4. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about February 5, 1937, Herbert G. Jacobson, George Turley, Peter W. Burns and Chester Bollenbach had a conversation at Schwartz's Restaurant in the City and State of New York.

992

5. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about February 5, 1937, Jacobson and Burns went to the office of Manning & Company, located at 80 Wall Street, in the City and State of New York.

That is the indictment, and that is the legal means of presenting the case to you for your consideration.

No inference whatsoever is to be drawn from the fact of the finding of the indictment. The defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption stays with the defendant from the beginning to the end of the trial or until it is overcome by evidence that satisfies you beyond a reasonable doubt of the defendant's guilt.

993

The term "reasonable doubt" does not mean beyond all doubt. It is a doubt that appeals to your reason, judgment and common sense. It means a doubt which is substantial and not merely a shadow. It does not mean a doubt which is merely capricious or speculative; neither does it mean a doubt borne of reluctance on the part of the jurors to per-

*Charge of the Court*

994

form an unpleasant duty, or a doubt arising out of sympathy for the defendant or out of anything other than a candid consideration of all the evidence presented.

If the Court should express an opinion on any phase of the testimony that would not be in any wise binding on you. It is your sole and exclusive province to decide the issues of fact in the case. That means the innocence or guilt of the defendant on trial.

995

During the trial the Court has been called upon to rule on objections and motions. The rulings on those objections and motions were as a matter of law only and do not indicate any opinion on the part of the Court as to whether the defendant is innocent or guilty. These were rulings on questions of law that were raised. You have no concern of course with the rulings of the Court. You are to decide the facts. The Court is to decide the law.

996

Now as I have said, there are two counts in this indictment. The first count charges a violation of the National Stolen Property Act, it being charged that this defendant and others transported or caused to be transported in interstate commerce from Minneapolis, Minnesota to New York City these gold notes of the Minnesota & Ontario Paper Company which had theretofore been stolen from the office of the Clerk of the United States District Court in Minneapolis.

The second count charges the conspiracy to violate the United States Stolen Property Act.

Section 415, Title 18, of the United States Code provides: "Transportation of stolen or feloniously taken goods, securities or money. Whoever shall transport or caused to be transported in interstate or foreign commerce any goods, wares or merchandise, securities or money, of the value of \$5,000 or more, theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be guilty of a crime."

The elements of that crime are the transportation or causing the transportation of securities known to have been stolen, and the transportation from the State of Minnesota to the State of New York. We are dealing with a federal crime only here of course. We are dealing with the transportation or causing to be transported from one State to the other of these bonds. That is the offense. The transportation of stolen securities of the value of over \$5,000, knowing the same to have been stolen, from one State to another. That is the crime charged in the first count.

The second count is the conspiracy,—and I shall have something to say about that later on in the charge—that is the conspiracy to commit the offense of transporting or causing to be transported in interstate commerce.

Now certain evidence has been admitted as to another alleged offense. The defendant is not being tried for that offense here. That is the Delaware offense, but that is admitted solely upon the question of the defendant's intent, and he is not being tried for any other crime except that charged in this indictment. That is the only one you are dealing with, the two counts in this indictment. The other evidence as to the Delaware acts relates to the intent of this defendant, and can be considered by you only for that purpose and that purpose alone.

So you must, so far as the first count is concerned, determine whether the Government has established beyond a reasonable doubt that the defendant either stole the bonds, or knowing that they were stolen, transported the bonds himself, or was a party to a plan to transport the bonds from Minneapolis to New York in interstate commerce. That is, did he participate, directly or indirectly, in that. The burden is upon the Government to establish that beyond a reasonable doubt. If it does not, you will acquit. If it has established it beyond a reasonable doubt, you will

*Charge of the Court*

1000

find the defendant guilty, if these bonds were of the value of \$5,000 or more. Now if it appears to your satisfaction that the defendant had nothing to do with transporting the stolen bonds, or causing them to be transported, and his dealings with the bonds only after they were transported, that would not be a crime, and your verdict in that event would be not guilty. If you find that the defendant transported these bonds or participated in it by having somebody else do it, knowing them to be stolen, and their value was over \$5,000, and they were transported from one state to another, the crime would be complete. It would not be necessary in order to convict that you find that he actually transported them himself.

1001

One who aids, abets, assists or counsels another to commit a crime is guilty of the crime. If one assists another in committing a crime, and does it knowingly, he becomes a principal, and is just as guilty as the one who actually does it. If he had nothing to do with it he would not be guilty. If you believe that he neither transported nor caused to be transported these bonds, why he is not guilty. If you believed he did not enter into any arrangement to do that or any agreement, you will find him not guilty. On the other hand, if you believe that this defendant entered into a scheme to either steal the bonds and transport them, or if somebody else stole them and he didn't, but somebody else did with his knowledge and consent, and either transported them or caused them to be transported, he would be guilty. If he did not he would not be guilty. You are to decide the knowledge and intent and the participation, if any, of the defendant. If the participation of this defendant in this was subsequent, that is, that he did not know that they were transported, that is, if he did not transport them or cause them to be transported himself, of course there would be no offense. That is, if the bonds arrived in New York and he had

1002

nothing to do with transporting or causing them to be transported there would be no offense. On the other hand, if he knew these bonds were stolen by himself or somebody else, and whether he transported them himself or somebody else transported them, with his knowledge and consent, he would be guilty of a crime. You are to determine knowledge and intent from the facts in this case, from the evidence and the evidence alone, and nothing outside the evidence.

If two or more persons conspire, either to commit an offense against the United States or to defraud the United States, and do any act to effect the object of the conspiracy, the crime is complete.

1004

Now in this case there has been testimony offered of an accomplice who has been convicted in this court. You will scrutinize that testimony with care and caution and give it such weight as you think it deserves under the circumstances. Where two or more persons act together to accomplish something unlawful a conspiracy is shown, even though there be no direct evidence of an express agreement. A mutual implied understanding is sufficient so far as proof of a combination is concerned. The agreement is generally a matter of inference deduced from acts of the persons accused done in pursuance of an apparent criminal purpose. Where two or more persons conspire, confederate or combine together to commit or cause to be committed a breach of the criminal law of the United States it is an offense of grave character which involves not only a plot to subvert the law but also the preparation of the conspirators for further criminal practices. It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this the statute has made a conspiracy to commit a crime a distinct offense from the crime itself. When conspirators enter into agreement to accomplish an unlaw-

1005



1006

*Charge of the Court*

ful act, they become agents for one another, and the act of one in pursuance of the common purpose is deemed to be the act of all, and they become responsible for that act.

In determining whether or not a conspiracy existed in a case like this one, you are not to judge the character and effect of the conspiracy by dismembering it and viewing its separate parts, but only by looking at it as a whole. In other words, you are to consider all the facts and all the circumstances, all the testimony and all the exhibits in this case.

1007

In order to find the defendant guilty here it is not necessary that the Government prove that he and others met together and entered into an express agreement. When men in fact enter into a plan of that character, they do not necessarily expressly agree. Much is left to an unexpressed understanding, and it is not necessary that there should have been any moment in which they met and with any formal expression or words agreed upon a plan.

In connection with conspiracy, the question of whether or not the defendant accomplished what he conspired to do is immaterial to the question of guilt or innocence here. The offense of conspiracy is complete if you find the defendant was a party to an illegal agreement set forth in the indictment and that he or any other defendant committed an overt act.

1008

You have to determine whether there was any understanding or agreement between this defendant and others. Whether there was a scheme set up or any arrangement to evade or attempt to evade the law. It is not necessary that there be evidence of any formal agreement to do the act charged. Conspirators do not put their agreements in writing, nor do they make public their plans. It is sufficient to show that the minds of the parties met in an understanding way so as to bring about an intelligent and deliberate agreement to do the act or acts charged, although

such an agreement is not manifested by any formal words. A mutual implied understanding is sufficient so far as the combination or confederacy is concerned. The agreement or conspiracy is generally a matter of inference, deduced from the acts of the persons accused which are done in pursuance of an apparent criminal purpose. It is rarely susceptible of proof by direct evidence, and may be deduced from the conduct of the parties and the attending circumstances.

If you find circumstances of secrecy, intrigue and deviousness, or an attempt to conceal the real nature of the transaction, you may consider them along with the evidence in this case. 1010

The elements of a criminal conspiracy are, first, an object to be accomplished; second, a plan or scheme embodying means to accomplish that object; and, third, an agreement or an understanding between the defendant and others whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme or by any effectual means; and, lastly, an overt act by one or more of the defendants, parties to the agreement.

First, the object; second, the plan; third, the corrupt agreement, and lastly, an act to carry out that agreement. Those are in substance the necessary steps. 1011

Conspiracy need not necessarily be established by direct evidence. Circumstantial evidence may be sufficient. Direct and circumstantial evidence differ merely in their logical relation to the facts in issue. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the facts in issue, and a conviction may be had on circumstantial evidence. To warrant such conviction the proven facts must not only be consistent with the hypothesis of guilt but must clearly and satisfactorily exclude every other reasonable hypothesis save that of

1012

*Charge of the Court*

guilt. Circumstantial evidence is enough to support a verdict of guilty provided the jury believe the defendant guilty. Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. This is legal evidence, and a jury must act upon it as if it were direct, when it is satisfactory, beyond a reasonable doubt.

1013

I will give you an example of what I mean by circumstantial evidence. - There are many, but I will give you but one. If you wake up one day in July and the temperature is around 95 and you look out of the window and you see that everything is wet, the trees, the houses, the buildings, the grass, and you see water running along the street, and the houses and everything wet, you may conclude that it rained, although you didn't see it. In other words, you may apply your common sense and judgment based again upon your experience in life.

1014

In your everyday life you do not hear witnesses under oath as a general thing. A man makes a business proposition to you and you observe his demeanor and manner, and you come to a conclusion. You say, "I believe this man; I think he is telling the truth." Another man, you listen to him and you say, "I wouldn't believe him on a stack of Bibles." Or you may say, "I believe certain statements, but I will disregard the rest of what he has said."

The law says to you as jurors that if any witness has taken the witness stand and wilfully testified falsely to a material fact you have a right to cast aside all of his testimony, or to retain the part you believe to be true. Some of these witnesses have criminal records, and you are to consider that on the question of their credibility. That does not mean that a man is not telling the truth, but the law says to you as jurors that you may consider

the fact, the type of a man that he is, the type of a person he is, and thus determine whether you will believe him; whether he is telling the truth or not; whether you believe all he says or only part of it. It is placed wisely in your hands.

Now as to conspiracy, a formal agreement need not be proved. It is sufficient to show that the parties were acting together to accomplish some unlawful act, even though each individual conspirator may do acts in furtherance of a conspiracy apart from the others. If there was a conspiracy, and the defendant was a part of it, and somebody does some act in furtherance of the conspiracy, the crime would be complete. In other words, having satisfied yourself beyond a reasonable doubt that the Government has shown a corrupt agreement, it makes no difference what overt act is proven as long as you find an overt act was done to carry out the agreement. It is important that you first decide whether there was a corrupt agreement, because the overt act must be independent, it must be a subsequent independent act following the completed agreement and conspiracy, and done to carry into effect the original agreement. 1016

The Government charges a number of overt acts here. Five overt acts. If the Government proves a conspiracy and one overt act that is sufficient. If there was no agreement, and no overt act, there would be no crime. Overt acts may be innocent or criminal in their nature. To constitute an offense it must be shown that one of the parties did something to carry out the crime. An illegal agreement without an overt act is not a crime, and a conspiracy is not effective until an overt act is committed; that is, until the agreement is vitalized by an overt act. Persons may conspire to commit an offense, but if it stops there and no act is done to carry the object into effect, no crime has been committed. If the act however is done to effect 1017

1018

*Charge of the Court*

the object of the conspiracy, that moment the criminal liability is fixed and this act, although done by one of the parties only, binds each and all of the parties. If they are not parties to the agreement it makes no difference how many acts are committed, it makes no difference, but having once been a party to the agreement then they are responsible for the acts of the others.

1019

Of course you are not to decide the case on surmise, guess or speculation, but on the evidence and the evidence alone. If a fact is once established, you may draw reasonable inferences from that evidence. Use your common sense. You are not leaving your common sense behind as jurors, but you are taking it along with you into the jury room. Where facts or circumstances are subject to two inferences, one pointing to guilt and the other to innocence, it is your duty to take the one pointing to innocence. In other words, the burden is on the Government to establish guilt beyond a reasonable doubt.

1020

The failure of either side to call available witnesses raises the presumption as a matter of law that such witness would have given testimony adverse to the side failing to call him. You have heard the testimony here and the case has not been very long. You have observed these witnesses and their demeanor and manner of testifying. There are two charges, one, that the defendant transported or caused to be transported in interstate commerce these bonds of over \$5,000 in value knowing the same to have been stolen, transported them from the State of Minnesota to the State of New York. He either did it or did not, and that is for you to decide. And the other question is whether there was an agreement or understanding, an unlawful agreement or understanding and an overt act done in furtherance thereof. That is, a conspiracy to transport or cause to be transported these bonds. He either did that or he did not. That is for you to decide.



You have to weigh the testimony of the witnesses. Undoubtedly you have come to a conclusion about these witnesses as they have testified before you; how much weight you will give their testimony, what impression they made on you after hearing them and seeing them.

Now the issue is with you. That is, you are to decide the issue on the facts and the evidence and the evidence alone and nothing outside the evidence. As I said, you have a right to draw reasonable inferences from the evidence.

The lawyers have a duty to perform, you have a duty to perform, and the Court has a duty to perform. You will lay aside all consideration of prejudice or bias and take the case with an eye single of performing your duty fairly and honestly. Your verdict must be based on the evidence. You will take up each count separately. There are two counts, and you will deal with them separately. Decide the case honestly, fairly and squarely. You are not concerned with the consequences of your verdict be it what it may. The lawyers have a duty, you have a duty and the Court has a duty to perform. All we are required to do is to perform our respective duties under the law.

1022

Any exceptions?

Mr. Fennelly: I have one request that I have not put in. I would ask your Honor to charge that they must draw no inference from the fact that the defendant did not take the witness stand; that the Government must prove their case beyond a reasonable doubt.

1023

The Court: The defendant did not take the witness stand and he is not required to, and no inference is to be drawn from that fact.

The two alternate jurors are discharged.

The jury may have the exhibits if they want them. You may send for them if you wish them. And you may have a copy of the indictment now.

1024

*Colloquy of Court and Counsel*

(At 3:10 P. M. the jury retired to deliberate.)

(At 6:10 P. M. the jury returned into the courtroom.)

The Court: I understand that you want some papers. Just what do you want?

The Foreman: The Hart Smith correspondence.

A Juror: And, your Honor, may we have the testimony of Mrs. Tryon read.

The Court: You want it read to you?

The Juror: Yes, please.

The Court: Very well.

1025

(The reporter read the testimony of Mrs. Jane Rhodes, omitting the portions which were stricken out by the Court.)

The Court: Give the jury all the papers in connection with the Hart Smith correspondence. Is there anything else you want?

The Foreman: No.

A Juror: Was there any date fixed on the dinner at Schwartz's Restaurant?

Mr. Reis: I think it was around the 5th or 6th. When you see these exhibits you may tell. I think it was the 5th.

1026

Mr. Fennelly: Yes, I think the witness said the 5th.

The Court: Is there anything else?

The Foreman: May we retire?

The Court: Yes.

(At 6:50 P. M. the jury went out to dinner and returned for further deliberation.)

(At 10:00 P. M. the jury returned into the courtroom.)

The Court: Have you reached a verdict?

The Foreman: No, sir, it is a hopeless deadlock.

The Court: Any questions of law disturbing you? If there are any questions this is the time to ask them. Is there any question of law disturbing any member of the jury? If so, let me have it now as I am going to give you all night and tomorrow if you want it to consider this case, and I am not going to hurry you at all, so you may as well tell me if there is any question of law disturbing you.

The Foreman: There is not a question of law. I think we are hopelessly deadlocked. It is a question of being divided and we cannot agree.

The Court: If there is any question of law disturbing any juror here, let me know.

1028

The Foreman: No.

The Court: Do you want any further testimony read?

The Foreman: No.

A Juror: What about the testimony of Chell Smith from the Minnesota Courthouse? I would like to hear that testimony read.

The Court: I will add this to the charge; perhaps I didn't cover it sufficiently: It is the law that the unexplained possession of stolen property shortly after the theft is sufficient to justify the conclusion by a jury of knowledge by the possessor that the property was stolen. In other words, if you find from the evidence that this defendant was in possession of these—if his possession of the bonds was recent, within a short time, the unexplained possession of those stolen bonds after the theft is sufficient to justify a conclusion by you jurors of knowledge by the defendant that the property was stolen. Now, to possess something you don't have to carry it around in your hand. If it is yours and you exercise dominion over it, it is in your possession. Or, to give an illustration, if one of your number left your watch home today and you are in the courtroom, the watch is in your possession, or if you have left your business in charge of employees,

1029

*Colloquy of Court and Jurors*

1030

the business is still in your possession. Or if the defendant permitted somebody else to actually handle the bonds, they were in his possession. One who aids and abets another is as guilty as the principal. It is for you to determine upon the evidence and the evidence alone all the facts and circumstances. The Government doesn't have to prove that the defendant actually stole these securities and removed them from Minnesota. Or that he actually took them or that he actually brought them to New York. It is sufficient if he were acting in concert with others and someone did it pursuant to the conspiracy and the end in view. And you will bear in mind all the rest of the charge. You are to determine the issue of fact here, whether or not upon this evidence the defendant is guilty or innocent.

1031

Is there any question of law?

A Juror: They were using the 1935 trouble in Delaware as proof of his guilt in this.

The Court: That was only received and is only important on the question of intent, the Delaware situation.

And let me say another thing to you gentlemen and lady, that you are to consider this evidence very carefully. You are not to be coerced into a verdict at all of course, but you are to reason it out, and a juror should not have a pride of opinion and stand in the corner and say, "That is the end of it; I have made up my mind and I won't discuss it." I want you to go out and deliberate, and I don't want you to be fooled in this case.

1032

A Juror: Can any act of conspiracy be performed after the crime is committed?

The Court: That is one of the crimes alleged, the conspiracy. Conspiracy is one crime alleged and the other is bringing in or causing to be brought in in interstate commerce the stolen bonds. Any other questions?

The Foreman: I think the overt acts ought to be explained to some extent.

The Court: - Overt acts may be innocent acts in and of themselves. Let me give you an illustration. If two men agree to burn down this building for example. They just say "We are going to burn it down." And they commit no overt act. Then there is no crime. Just by talking about it there is no crime. Now if as a part of that conspiracy it is the duty of A to cross the street twice as a signal—ordinarily crossing the street twice is not a crime in and of itself. But if crossing the street is the signal to the man on the other side to burn the building, that is an overt act. An overt act may be innocent, like crossing the street, or it might be the firing of a gun. There would be the crime of firing the gun and the crime of conspiracy, and the overt act in that picture would be a guilty act as well as the overt act itself. Does that explain it? Are there any other questions?

1034

In think in this case there ought not to be any difficulty in coming to a proper verdict. The lawyers have a duty to perform and the Court has performed its duty and now you perform yours. I am going to give you such time as you need. You have in mind all the charge that I have given you and what I have given you since you came in.

1035

Are there any other questions? I am going to wait here until half-past ten. You don't have to agree by half-past ten, but if you haven't agreed by that time I will send you to a hotel tonight. That doesn't mean you to have to agree at 10:30. You can take as much time as you want, tonight, tomorrow and tomorrow night if you need it.

Are there any other questions?

All right you may retire.

(At 10:10 P. M. the jury left the courtroom.)

(At 10:30 P. M. the jury returned into the courtroom.)



1036

*Colloquy of Court and Counsel*

Mr. Fennelly: Your Honor, had left the bench so quickly—

The Court: I thought I gave you plenty of time. You may take your exceptions on the record.

1037

Mr. Fennelly: I except and I would like it to appear that at about 10:15 P. M. the jury returned and reported to your Honor that they were in a hopeless deadlock. That your Honor then proceeded to read to them some law pertaining to an inference to be drawn about the unexplained possession of bonds by a defendant. I except to that charge as—while it may be the law it has no application to this case because any connection this defendant had with the bonds in New York is fully explained.

The Court: By what?

Mr. Fennelly: By the evidence that he had them.

The Court: By what?

Mr. Fennelly: What he did have to do with them.

The Court: What evidence are you speaking of?

Mr. Fennelly: The evidence of the case according to the Government's theory was that he was in Minneapolis.

The Court: What is explained?

1038

Mr. Fennelly: The evidence itself explains what he had to do with them.

The Court: What explains it?

Mr. Fennelly: He has admitted that the first time he had anything to do with them was in New York.

The Court: You mean his statement to the F. B. I.?

Mr. Fennelly: Yes, your Honor.

The Court: That is not testimony, that is a statement.

Mr. Fennelly: It is the same thing.

The Court: They are to consider that. A statement of the defendant does not take the place of evidence before the Court.

Mr. Fennelly: The testimony of Mr. Blaser and Mr. Ingalls explains it. The law has no application to the state of the facts.

The Court: All right.

Mr. Fennelly: I further except to your Honor's failure to instruct in response to one of the jurors. I understood the question was whether or not a conspiracy could be committed where the object of the conspiracy had already been completed.

The Court: I had already told the jury that could not be.

Mr. Fennelly: I think in response to the juror's question your Honor instructed them something about overt acts.

The Court: I had already explained that in the charge, that if the crime ended that was the end of it.

Mr. Fennelly: I except to your Honor's comments to the jury.

1040

The Court: Which comment?

Mr. Fennelly: That you do not want the jury to be fooled.

The Court: No, I don't want any jury to be fooled in any case.

Mr. Fennelly: Neither do I, but I except to your Honor's remarks.

The Court: I didn't mention whether it was for the Government or the defendant. I simply say that I do not want anybody to be fooled. I have this note from the jury: "If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count."

1041

Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another State than that in

1042

*Exception to Charge*  
*Verdict—Motion to Set Aside*

which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case.

Mr. Fennelly: I except to your Honor's charge. And I ask—

The Court: I won't take any requests. You may except to the charge, but I will not take any requests.

1043

Are there any other questions?

Mr. Fennelly: Exception.

The Foreman: May we retire? I think we will reach a verdict in a short time.

The Court: How much time do you want?

The Foreman: Just about fifteen minutes.

(At 10:40 P. M. the jury left the courtroom.)

(At 10:45 P. M. the jury returned into the courtroom.)

(The roll of jurors was called. All jurors present.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?

1044

The Foreman: We have.

The Clerk: How do you find?

The Foreman: We find the defendant guilty on the second count.

The Court: How about the first count?

The Foreman: Not guilty.

The Clerk: You say you find the defendant not guilty on count 1 and guilty on count 2, and so say you all?

The Foreman: Yes, sir.

The Court: Any motions?

Mr. Fennelly: I move to set aside the verdict and for a new trial as against the evidence and the weight of the evidence.

The Court: Motion denied.

Mr. Fennelly: An exception.

The Court: Well, it is unfortunate that I cannot give this defendant an adequate sentence. There is no question about his guilt on both counts. The record in this case indicates this man is an old offender and it is the stealing of the bonds from a court which makes it so serious. The most I can give this man is two years. I am not criticising you jurors, but I will say that if your verdict had been guilty on the first count, as I think it should have been, I could have given this man what I want to give him.

1046

The defendant will stand up.

I sentence him to two years and fine him \$10,000, the defendant to stand committed until the fine is paid.

Mr. Fennelly: I want to make an application for bail pending appeal.

The Court: You will have to make that on notice and a written application.

Mr. Fennelly: Will your Honor entertain that in the morning?

The Court: I think so. I am inclined to deny it, but I will be glad to hear you on it.

1047

1048

**Government's Exhibit 1 for Identification**

Memorandum of Armin Johnson, dated January 26, 1935, as to claimants who filed with their claims original bond or gold notes in the M. & O. Receivership—and bankruptcy proceedings.

**Government's Exhibit 2**

1049

Original five-year, 6%, gold notes of Minnesota & Ontario Paper Company, due March 1, 1931, for \$1,000 par value each, numbered 3308 to 3317 inclusive, 1022 and 1023.

**Government's Exhibit 3**

Photostatic copies of five-year, 6%, gold notes of Minnesota & Ontario Paper Company, \$1,000 par value each, due March 1, 1931, bearing numbers: 2061, 2062, 2088, 2900, 2901, 2950, 1021, 1189, 2006 and 2007.

1050

**Government's Exhibit 4**

Order of the U. S. D. C., District of Minnesota; 4th Dist., dated April 8, 1937, entered in the matter of Minnesota & Ontario Paper Company, Debtor—consolidated proceedings for the re-organization of a corporation, No. 11640, ordering the Clerk of the Court, upon the request of the owner and holder of any original note which had been filed with the Clerk of the Court, to return the same to the owner upon request, upon proper receipt.



**Government's Exhibit 5**

Picture of the defendant, Peter Burns.

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**Government's Exhibit 6**

Envelope from Arnold Berendson, 10 E. 40th Street, New York, to Messrs. Hart Smith & Company, 54 William Street, New York.

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1052

**Government's Exhibit 7**

Certified check of Hart Smith & Company, dated February 3, 1937, to the order of Arnold Berendson, in the sum of \$2,500, endorsed on typewriter: "For deposit, Arnold Berendson"; and in ink: "Hart Smith & Co."

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**Government's Exhibit 8**

1053

Blotter of Hart Smith & Company, dated February 4, 1937, showing receipt and sale of 10 M. & O. notes, at \$2,500, for the account of Arnold Berendson, notes numbered 3317-6-5-4-3-2-1-10-09-08.

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**Government's Exhibit 9**

Teletypes of Hart Smith & Company making inquiry concerning the bonds.

1054

**Government's Exhibit 10**

Teletypes of Hart Smith & Company making inquiry concerning the bonds.

**Government's Exhibit 11**

Photograph of the defendant Jacobson.

1055

**Government's Exhibit 12**

**ARNOLD BERENDSON**

SILK FACTOR

10 East 40th Street  
New York

Telephone LEExington 2-0364

February 6, 1937.

1056

Messrs Hart Smith and Co.,

54 William St.,  
New York, N. Y.

Gentlemen:—

Referring to the trade which I made with you earlier this week I have instructed Messrs Manning and Co., of 80 Wall Street to take over this account. You will therefore deliver to them \$10,000 Minnesota Ontario Paper Co 5. yr. 6% Gold Notes Due Mar. 1, 1931 against check for \$2,500.

Yours very truly

**ARNOLD BERENDSON**

Arnold Berendson.

**Government's Exhibit 13**

Photograph of appellant, Bollenbach

**Government's Exhibit 14 for Identification**

Photograph of appellant, Bollenbach

**Government's Exhibit 15**FEDERAL BUREAU OF INVESTIGATION, U. S. DEPT. OF JUSTICE  
87-359-1 F.Account No. A  
7580Authorized Signature under the CHECKMASTER PLAN of  
ROBERT C. WILSON

For the NATIONAL SAFETY BANK &amp; TRUST CO. OF NEW YORK

Signature—Robert C Wilson

Home Address—347 Elin St. New Haven Conn.

Mail—Business Address—Y. M. C. A. 34 St. N. Y. C.

Phone No.—

Date Opened—12/9

Business—Salesman

The account is subject to the rules and conditions printed in the pass book delivered to and accepted by the depositor, to all of which rules and conditions the depositor hereby agrees by the delivery hereof to the Bank and by the acceptance of the pass book.

1060

**Government's Exhibit 16**

National Safety Bank & Trust Company statement of account of Robert C. Wilson, for the period from Dec. 9 to December 23, 1935, recording deposit of \$5 on December 9, \$1,870.96 on December 18 and \$1,858.45 on December 20—all, but \$9.16 of which was withdrawn on December 23.

**Government's Exhibit 17**

1061 Check of Watson & White to the order of T. R. Johnson, for \$1,870.96, dated December 18, 1935, and endorsed: "T. R. Johnson", and bearing additional typewritten endorsement "pay to the order of National Safety Bank & Trust Company, Robert C. Wilson".

**Government's Exhibit 18**

Deposit slip of account of Robert C. Wilson, dated December 19, 1935, reflecting deposit of check for \$1,870.96 in the National Safety Bank & Trust Company.

**Government's Exhibit 19**

1062

Check, dated December 20, 1935, for \$1,858.45, of Watson & White to the order of T. R. Johnson, and endorsed: "T. R. Johnson", and bearing additional typewritten endorsement "pay to the order of National Safety Bank & Trust Company, Robert C. Wilson".

**Government's Exhibit 20**

Deposit slip of account of Robert C. Wilson, dated December 20, 1935, reflecting deposit of check for \$1,858.45 in the National Safety Bank & Trust Company.

**Government's Exhibit 21**

Check of Robert C. Wilson dated December 20, 1935, to the order of "cash", in the sum of \$1,800, on the National Safety Bank & Trust Company, and endorsed "S. Radin" and "OK, Robert C. Wilson".

**Government's Exhibit 22**

Check of Robert C. Wilson dated December 23, 1935, to the order of "cash", in the sum of \$1,925, drawn on the National Safety Bank & Trust Company, and endorsed "S. Radin" and "OK, Robert C. Wilson".

1064

**Government's Exhibit 23**

Account. No. A  
35979

Authorized Signature under the CHECKMASTER PLAN of  
MR ARNOLD BERENDSON

For the NATIONAL SAFETY BANK & TRUST CO. OF NEW YORK

Signature—Arnold Berendson

Home Address—356 W. 34th St.

Business Address—10 East 40th St.

Phone No.—Le. 20364

Date Opened—2/3/37. Business—Salesman Silk.

1065

The account is subject to the rules and conditions printed in the pass book delivered to and accepted by the depositor, to all of which rules and conditions the depositor hereby agrees by the delivery hereof to the Bank and by the acceptance of the pass book.

*Copyright by Alexander Efron 1935*



1066

**Government's Exhibit 24**

Passbook and identification (metal) tag of Arnold Berendson, for account at National Safety Bank & Trust Company, indicating initial and only deposit of \$2,500 on February 3, 1937.

**Government's Exhibit 25**

Checkbook of the National Safety Bank & Trust Company.

1067

**Government's Exhibit 26**

Four registered letters, addressed to Mr. Arnold Berendson, at 10 East 40th Street, New York and at the Bellevue Stratford, Philadelphia, Pa., returned to sender, National Safety Bank & Trust Company, marked: "Cannot be found".

1068

**Government's Exhibit 27****ARNOLD BERENDSON**

SILK FACTOR

10 East 40th Street

New York

Telephone LExington 3-0364

February 6, 1937.

National Safety Bank and Trust Co.,  
38th St. and Broadway,  
New York, N. Y.

1070

Gentlemen:—

Earlier this week there was deposited to my account  
"Check Master" No 35-979 a check in the amount of \$2,500  
drawn by Hart Smith and Co. which we I understand was  
returned due to the lack of a written endorsement.

Kindly deliver this check to the bearer and oblige.

Yours very truly

1071

ARNOLD BERENDSON

Arnold Berendson.

1072

**Government's Exhibit 28****ARNOLD BERENDSON**

SILK FACTOR

10 East 40th Street

New York

Telephone LExington 2-0364

February 9, 1937

1073

National Safety Bank & Trust Co  
 Broadway & 38th St  
 New York City

Gentlemen:

A few moments ago I phoned to Manning & Co, my brokers, and was informed that you refused to turn over to them a check deposited by me of \$2500 from Hart Smith & Co., owing to the fact that the endorsement contained thereon was typed.

1074

This letter will act as my endorsement on said check and you are authorized to deposit the same to my account.

I am sending Manning & Company a copy of this letter, together with check on my account with your bank for the sum of \$2500.

If there is any service charge, my brokers are authorized to pay it.

Yours truly,

ARNOLD BERENDSON

**Government's Exhibit 29**

Statement of account of Arnold Berendson, 356 W. 34th Street, New York City, in the National Safety Bank & Trust Company, indicating deposit of \$2,500 on February 3rd, 1937.

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**Government's Exhibit 30**

Unsigned form of receipt of National Safety Bank & Trust Company, dated February 5, 1937, for an unpaid check of Hart Smith & Company, in the sum of \$2,500, addressed to Arnold Berendson, 356 W. 34th Street, New York.

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1076

**Government's Exhibit 31**

Check to the order of Manning & Company, Inc. in the sum of \$2,500 dated February 10, 1937, drawn by Arnold Berendson on the National Safety Bank and Trust Company.

1077

1078

**Government's Exhibit 32****ARNOLD BERENDSON**

SIEK FACTOR

10 East 40th Street

New York

Telephone LEExington 2-0364

February 6, 1937.

1079

Messrs Manning and Co.,  
80 Wall St.,  
New York, N. Y.

Gentlemen:—

Pursuant to our conversation I am enclosing herewith written order on Messrs Hart Smith and Co., 54 William St., New York, N. Y. for \$10,000. Minnesota Ontario Paper Co. 5 Year 6% Gold Notes due March 1, 1931 against check for \$2,500.

You will please sell these bonds for my account. I understand the market is now quoted 26-29.

1080

Yours very truly

ARNOLD BERENDSON  
Arnold Berendson.

**Government's Exhibit 33**

Envelope addressed to Manning & Company, Inc. 80 Wall Street, New York City, sent by registered mail on February 10, 1937 from Philadelphia, Pennsylvania; return address, Bellevue Stratford, Philadelphia, Pennsylvania, and registered mail receipts.



**Government's Exhibit 34**

1081

Carbon copy of Government's Exhibit 28.

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**Government's Exhibit 35**

Photograph of defendant, Turley.

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**Government's Exhibit 36**

Photograph of Percy Campbell Mason.

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1082

**Government's Exhibits 37-40 for Identification**

Excerpts from the Grand Jury testimony of Herbert G. Jacobson dated November 1, 1939.

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**Government's Exhibit 41**

Unsigned assignment dated February, 1937, by Arnold Berendson to Manning & Company, Inc. of Berendson's account at National Safety and Trust Company and of check for \$2,500.00 drawn by Hart Smith & Company to Arnold Berendson. Also unsigned assignment dated February, 1937, from Arnold Berendson to Manning & Company, Inc. of Berendson's right, title and interest in and to \$10,000.00 par value of Minnesota, & Ontario Paper Company, five-year, 6%, gold notes, due March 1, 1931, heretofore delivered to Hart Smith & Company.

1083

**Government's Exhibit 42 for Identification**

Excerpts from Grand Jury testimony of defendant, Jacobson, dated November 1, 1939.

1084

**Government's Exhibit 43****ARNOLD BERENDSON**

SILK FACTOR

10 East 40th Street  
New York

Telephone LExington 2-0364

February 10, 1937

Manning & Company  
80 Wall Street  
New York City

1085

*Attention: Captain Manning.*

Dear Captain:

Sorry I was unable to call back at your office yesterday afternoon, due to the fact that my account book and identification tag were not immediately available.

My business compelled me to leave for Philadelphia last night and I am taking a plane later today for Chicago.

1086

In accordance with your instructions I am enclosing copy of a letter written to the National Safety Bank & Trust Co., together with a check in the sum of \$2500 to enable you to carry out my letter of instructions to you of February 6th.

I am also enclosing herewith checkmaster tag No. A35979 issued to me, together with account book for identification and slip stating I can draw said amount after February 5th.

Thanking you for your prompt attention in this matter,  
I am.

Yours very truly,

ARNOLD BERENDSON

**Government's Exhibit 44 for Identification**

Statement of defendant, Jacobson taken on September 18, 1939.

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**Government's Exhibit 45 for Identification**

Statement of defendant, Jacobson taken on September 20, 1939.

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1088

**Government's Exhibit 46**

Letter on letterhead of Blaser & Ingalls, dated January 19, 1937, to the Lawyers Trust Company: "Confirming the personal conversation of our Mr. Ingalls to the effect that all checks drawn by us on your institution must be countersigned by Mr. C. Mason as of today until revoked by us". Signed Blaser & Ingalls.

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1089

**Government's Exhibit 47**

Circular on letterhead of Blaser & Ingalls, Re: Rocky Mountain Fuel Company mortgage bonds.

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1090

**Government's Exhibit 48**

[LETTERHEAD OF]

**HOTEL NEW YORKER**

Thirty-fourth Street at Eighth Avenue, New York

February 5, 1937.

Messrs Blaser and Ingalls,  
32 Broadway,  
New York, N. Y.

1091

Gentlemen:—

Enclosed find herewith \$15,000 Minnesota Ontario  
Paper Co 5 Year 6% Gold Notes due March 1, 1931, of the  
following numbers 1021/25 Inc. 2900, 2901, 2950, 2006, 2007,  
2061, 2062, 1189, 2888 and 3480.

You will sell these and credit my account at 26 or better.

Yours truly

WALTER T. ROBERTS

1092

**Government's Exhibit 49**

Blotter of Blaser & Ingalls of February 10, 1937 record-  
ing the sale of 15 M. & O. notes.

**Government's Exhibit 50**

Ledger of Blaser & Ingalls showing account of Walter  
T. Roberts, showing receipt of M. & O. gold notes February  
8, 1937, and sale of same February 11, 1937.

**Government's Exhibit 51**

Copy of Hotel New Yorker registration card dated February 8, 1937 made out for Walter T. Roberts, Ford Building, Detroit, Michigan.

**Government's Exhibit 52**

Letter addressed by Hotel New Yorker on April 29, 1937 to Blaser & Ingalls in which the Hotel New Yorker refuses to give information concerning the registration of Walter T. Roberts and says it will forward mail to the latter if an address is available. 1094

**Government's Exhibit 53**

Check dated February 11, 1937 drawn by Blaser & Ingalls on the Underwriters Trust Company to the order of Walter T. Roberts in the sum of \$3,937.50. On the back thereof appears the endorsements: "Walter T. Roberts", "Endorsement guaranteed Blaser & Ingalls". 1095

**Government's Exhibit 54**

Carbon copy of letter by Blaser & Ingalls dated April 29, 1937 to the Northwestern National Bank and Trust Company, Minneapolis, Minnesota, inquiring as to the status of the 15 M. & O. notes sold by Blaser & Ingalls for Roberts.



1096

**Government's Exhibit 55**

Letter by the Northwestern National Bank and Trust Company dated May 4, 1937 to Blaser and Ingalls in response to Exhibit 54.

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**Government's Exhibit 56**

1097 Telegram addressed to Northwestern National Bank and Trust Company by Blaser and Ingalls requesting answer to the latter's letter of April 29, 1937.

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**Government's Exhibit 57**

Carbon copy of letter dated April 29, 1937 addressed by Blaser and Ingalls to the Hotel New Yorker asking for the forwarding address of Walter T. Roberts.

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1098

**Government's Exhibit 58**

Letter dated May 6, 1937 from Blaser and Ingalls to the Northwestern National Bank and Trust Company asking for information as to whether the bonds sold for Roberts were stolen.

**Government's Exhibit 59**

Letter dated May 8, 1937 addressed to Blaser and Ingalls by Northwestern National Bank and Trust Company suggesting that the former communicate with the Old Colony Trust Company, Boston, Massachusetts.

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**Government's Exhibit 60**

Carbon copy of letter dated April 30, 1937 addressed to W. T. Roberts at the Hotel New Yorker by Blaser and Ingalls. "With reference to Rocky Mountain Fuel 5s in which you expressed a strong desire in February of purchasing same in exchange for Minnesota and Ontario Paper Company 6s, we wish to inform you that the October 1 coupon which was then in default was paid on the latter part of March this year. Due to the present market conditions these bonds have declined since our discussions. We believe that they offer exceptional speculative possibilities at the present time."

---

1100

**Government's Exhibit 61**

Account card of Peter W. Burns, Julia A. Bauer, and The Bond and Share List Company, at the Corn Exchange Bank Trust Company, New York.

1101

1102

## Government's Exhibit 62

Please Report Promptly on this Account

CORN EXCHANGE BANK TRUST CO.  
.....Branch

In Account with BOND AND SHARE LIST COMPANY

	Dr.			Cr.
	Feb 1 1937	16 35	Jan 30, 1937 Bal	358 36
1103		10	Feb 1	19 50
	2	21 50		110
		60	2	10
	4	25	4	50
	5	21	5	20
		5 98	9	15
		25		20 49
	6	10	10	25
	6	40	11	72
	8	19 07		40 40
		15	13	98
	9	2		92
1104	10	1	15	20
	11	27 50		12
		1		1200
	13	21	16	25
		30		31 65
		3 80	18	44 92
	15	9	20	26
		16 32		
		30		
			Total Credits	2290 32
			Total Debits	1044 12
	16	46 65	2/23/37 Balance	1246 20

*Government's Exhibit 64*

1105

	3 75
	100
	25
17	3 55
18	22 55
	2
19	4 30
	50
	10
	100
20	5
	28 05
	175
	40
23	4
	13 75
	<hr/>
	<hr/>
	1044 12

1106

**Government's Exhibit 63**

1107

Deposit slip of the Corn Exchange Bank Trust Company dated February 15, 1937 showing deposit of \$1,200.00 in bills to credit of Bond and Share List Company.

**Government's Exhibit 64**

Exemplified copy of proof of claim of Union Cooperative Insurance Association for \$20,000.00 filed in the Court of Chancery, New Castle County, Delaware, December 28, 1932, in the Receivership of General Theatres Equipment Inc.

1108

**Government's Exhibit 65**

Exemplified copy of proof of claim of Electrical Workers' Benefit Association for \$10,000.00 filed in the Court of Chancery, New Castle County, Delaware, December 28, 1932, in the Receivership of General Theatres Equipment Inc.

**Government's Exhibit 66**

1109

Account card of T. R. Johnson, 246 Fifth Avenue, dated December 16, 1935, at Watson & White. Endorsed "T. R. Johnson" on the back thereof.

**Government's Exhibit 67**

1110

Papers of Watson & White reflecting dealings with T. R. Johnson during December, 1935. They show the sale of the General Theatres Equipment Inc. bonds for the account of T. R. Johnson and the issuance of checks therefor totalling \$5,587.86.

**Government's Exhibit 68**

Application dated December 12, 1935 for office service at 246 Fifth Avenue, taken out by T. R. Johnson.



**Government's Exhibit 69**

New York, N. Y.  
September 7, 1939

**STATEMENT OF CHESTER G. BOLLENBACH**

Statement of Chester G. Bollenbach, made to Special Agents J. D. Milenky and J. J. Keating of the Federal Bureau of Investigation, U. S. Department of Justice at 2.07 p.m. on September 7, 1939 in Room 607, U. S. Court House, Foley Square, New York, N. Y. Stenographer Nathaniel Bodinger. 1112

*By Agent Milenky:*

Q. What is your name? A. Chester G. Bollenbach.

Q. Where do you reside? A. I lived at Bloomfield, N. J.

Q. At what address in Bloomfield, N. J.? A. When I am in Bloomfield, at 21 New Street.

Q. N-e-w? A. N-e-w, yes.

Q. Do you have any other address? A. I also reside at 663 60th Street, Brooklyn.

Q. Sixtieth? A. Sixtieth; that's right. 1113

Q. Mr. Bollenbach, both Mr. Keating and I inform you that we cannot force you to tell us anything; that you are under no obligation whatsoever to make any statement of any nature, but that if you do make a statement, anything that you say to us can be used against you as evidence in court. Do you understand that? A. To an extent.

Q. Now we also inform you, as we have informed you previously that we cannot promise you anything of any nature whatsoever; that if you do desire to make a statement, that statement on your part must be voluntary in all respects; that we cannot and will not promise you anything

1114

*Government's Exhibit 69*

of any nature whatsoever. Do you understand that? A. You have so advised me that, if I cooperate with the Department in this matter the court will be advised, which I am willing to do.

1115 Q. You are evidently mistaken, Mr. Bollenbach. I advised you of no such thing and I want to advise you at the present time that it is not within our province to advise the court about anything; that the province of the Federal Bureau of Investigation of the U. S. Department of Justice is to investigate violations of the law, which we are doing at the present time; that in that report outlining the findings in our investigation we state only facts. Naturally, if you do cooperate and if you do tell the truth and we know that it is the truth, that report will so show. Do you understand that? A. I do.

Q. And you also understand that anything that you say can be used against you? A. I am going to try to tell to the best of my recollection of things or transactions that took place.

1116 Q. But you still have not answered my question. Do you understand that anything that you say can be used against you? A. I have nothing to fear so whatever any statement I may make is the truth as far as my recollection on any transaction will serve.

Q. What is your occupation? A. Research.

Q. What kind of research? A. Corporate research.

Q. How long have you been engaged in that kind of work? A. Since 1931.

Q. What does that work consist of? A. Examining corporation balance sheets.

Q. And then what? A. Statistics.

Q. What do you do with those statistics? What do you do with your examinations? A. Reorganizations where plans have been, are or will be submitted for the revamping

of the capital structure, to find out the defects and the good features of a plan.

Q. How long have you been engaged in this type of work? A. Since 1931.

Q. How old are you? A. I will be 47.

Q. Where were you born? A. Bloomfield.

Q. When? A. October 1, 1892.

Q. Are you acquainted with one Peter Burns? A. I have known Peter Burns for eighteen years.

Q. B-u-r-n-s? A. That's right.

Q. Who is Peter Burns? A. Peter Burns is Peter Burns. I don't know what you mean by that. 1118

Q. What is his business? A. Lists.

Q. Where is his office? A. 15 William Street.

Q. Does he operate under his own name or under a company name? A. He operates as Peter Burns trading as Bond and Share List Co.

Q. How long has he been at that address? A. As long as I have known him. I'd say that offhand. If he has been somewhere else, I don't know.

Q. Are you associated with Peter Burns in any way? A. I am not and never have been.

Q. Do you use his office for any purpose? A. Mail. 1119

Q. What do you mean "mail"? A. Mail that I receive is sent to his office for me.

Q. Did you ever have any business transactions with Peter Burns? A. I bought some lists from him.

Q. I show you a letter written on the stationery of the Hotel New Yorker, 34th Street at Eighth Avenue, New York, N. Y., dated February 5, 1937, addressed to Messrs. Blaser & Ingalls, 32 Broadway, New York, N. Y., which letter states that there are enclosed \$15,000 worth of Minnesota & Ontario Paper Co. 5-year, 6% gold notes due March 1, 1931 of the following numbers: 1021/25 inclusive,

1120

*Government's Exhibit 69*

2900, 2901, 2950, 2006, 2007, 2061, 2062, 1189, 2888 and 3480. This letter, as you will note, is signed "Walter T. Roberts" (exhibiting letter). I ask you whether or not you can identify this letter. A. I believe I have seen this letter before.

Q. Will you tell us under what circumstances you saw this letter before? A. I am not sure whether this letter was in my possession and I delivered same to Blaser & Ingalls or not, or whether I saw this in the office of George Turley.

1121

Q. Do you know the circumstances surrounding the transaction mentioned in this letter? A. I believe I do.

Q. Will you tell us about them? A. To the best of my recollection, if I am wrong when I give you this date I want you to correct it, in January 1937 Mr. Burns said that he had received or was in possession of some bonds mentioned in a letter of February 5, 1937, Minnesota & Ontario Paper bonds that were for sale, and he asked me if I could help dispose of same. I told him at that time I had no source, but after a few minutes hesitation and thought, I knew that George Turley was a broker and that we could sell them through Turley. He and I then proceeded to Turley's office. Later that afternoon I believe Ingalls came to Turley's office and at that time there was a discussion whether they could dispose of these bonds and Ingalls said that he thought that he could.

1122

On or about February 4th or 5th, I don't know just the exact date, Ingalls did dispose of these bonds, and before disposing of these bonds, he wanted a letter of instruction, which is a letter of February 5th, signed by one Walter T. Roberts.

Q. Who is Walter T. Roberts? A. I do not know.

Q. Did you sign that as Walter T. Roberts? A. I did not.

Q. Who prepared this letter of February 5, 1937? A. As near as my recollection serves me, that letter may have

been prepared in collaboration with George Turley, Peter Burns and myself, also Blaser & Ingalls.

Q. Where was it prepared? A. The exact place I do not know.

Q. Is there such a person as Walter T. Roberts in existence? A. Not to my knowledge.

Q. Why was it prepared for the signature of Walter T. Roberts? A. I suppose as a vehicle for a sale. I guess that is an intelligent answer, isn't it? As near as my recollection serves me.

Q. You mean that you and Turley and Peter Burns wanted it to appear that an individual by the name of Walter T. Roberts was selling the bonds? Is that correct? A. At this late date, I would say yes. 1124

Q. These bonds weren't owned by Walter T. Roberts, were they? A. As to the true owner of the bonds, I never have been able to find out who owned them.

Q. Did you ask Peter Burns where he obtained these bonds mentioned in that letter? A. I did not.

Q. Why couldn't Peter Burns have sold these bonds under his own name? A. I see no reason why he couldn't.

Q. Did you ask him? A. I don't recall that I did.

Q. Did you ask him where he obtained these bonds? A. He told me that he obtained them out West. 1125

Q. Where? A. I do not know.

Q. I show you a check dated February 11, 1937, payable to the order of Walter T. Roberts in the sum of \$3,937.50, made by Blaser & Ingalls, drawn on the Underwriters Trust Co., 37 Broadway, New York, N. Y., the reverse of which check bears the endorsement, "Walter T. Roberts, endorsement guaranteed, Blaser & Ingalls, Blaser & Ingalls," and ask you whether or not you can identify this check (exhibiting check). A. Check of February 11th, I have seen.



*Government's Exhibit 69*

1126

Q. What does this check represent? A. Thirty-nine hundred and twenty-seven dollars and fifty cents.

Q. 3937.50. A. 3937.50.

Q. For what? A. I presume for monies that were paid on the sale of bonds.

Q. What bonds? A. Minnesota Ontario Paper.

Q. You mean the bonds mentioned in the letter of February 5, 1937 which you identified? A. That's right.

Q. Is that endorsement, Walter T. Roberts, on the back of this check in your handwriting? A. It is not.

1127

Q. Do you know whose handwriting that is? A. I do not.

Q. Was this check endorsed in your presence? A. To my knowledge, I don't even know.

Q. Did you receive this check from Blaser & Ingalls? A. I don't know whether that check came from Blaser & Ingalls direct to Turley or whether it was given to me.

Q. Do you recall the incident of cashing this check? A. I wasn't present when the check was cashed.

Q. Were you present when the proceeds in cash from the sale of these bonds were distributed? A. I was present in George Turley's office in the afternoon that Ingalls brought the \$3937.50 to George Turley's office.

1128

Q. What did Ingalls do with that money? A. He gave it to Turley.

Q. Who else was there besides you and Turley? A. Ingalls and Burns.

Q. Did you receive any part of the proceeds from the sale of these bonds? A. At first I did not.

Q. What happened when the money was distributed in Turley's office on the day that Ingalls brought the money in? A. I believe that Ingalls got—I don't know how much cash he actually got. Whatever you tell me is there, I will—if my mind serves me, I think that Blaser and Ingalls got six or seven hundred dollars.

Q. All right. Whatever you remember as the best of your recollection. How much did Turley get? A. I think about the same amount.

Q. And did Peter Burns get any? A. Peter Burns got the balance.

Q. You say at that time you didn't get anything? A. No, I didn't. I mean, right at that minute.

Q. Did you say anything to Turley at that time? A. I says, "Where do I fit?"

Q. What did Turley say? A. He says, "I think you are entitled to—" I think I got—I don't know what it was. 1130  
I think I got \$1,000 and then I had to kick back either one hundred or two hundred bucks. So I believe my net proceeds in that whole transaction was around seven or eight hundred dollars.

Q. You say you had to kick back a couple of hundred dollars? A. Yes, because—

Q. To whom? A. Turley. I may be wrong on just the exact amount that went back.

Q. These bonds didn't belong to you, did they? A. No, they did not.

Q. Why did you receive that much money from the proceeds of the sale of these bonds? A. I have no explanation to make because there isn't any. 1131

Q. Did you know that these bonds had been stolen? A. I did not at the time the deal was put through.

Q. You knew that the transaction was not a legitimate transaction did you not? A. Not from its very inception.

Q. When did you first learn that the transaction was not legitimate? A. That I can't answer.

Q. Why do you think they were giving you that much money? A. There was no money to be given to me in this entire transaction.

Q. But you asked where you came in, didn't you? A.

1132

*Government's Exhibit 69*

Well, I thought at least I was entitled to a fee, a finder's fee, of disposing of bonds, there is a commission.

Q. You knew that there was no such person as Walter T. Roberts in existence, didn't you? A. After the transaction got under way, I realized that a terrible mistake had been made and would have subtracted myself entirely out of the transaction had I been able to.

Q. But you knew there was no such person as Walter T. Roberts in existence, didn't you? A. That is true.

1133

Q. Then you knew at the time that you had this letter, that this letter was prepared, that there was something wrong with that transaction, didn't you? A. After I was in it, yes.

Q. Did you then inquire of either Turley or Burns where these bonds came from? A. It was too late.

Q. Did you ask them? A. I don't know that I did.

Q. Did you have any conversations with either Turley or Burns subsequent to the transaction when the authorities started investigating this case? A. What do you mean by the word "subsequent"?

1134

Q. After the transaction was over and the bonds had been passed and the money distributed and the authorities began to investigate the case? A. I definitely never had any knowledge that the authorities were investigating.

Q. Didn't anyone tell you? A. I think Burns did.

Q. What did Burns say? A. That they were investigating this transaction.

Q. And what did he tell you? A. And that at that time there had to be some money put up to help Blaser & Ingalls out.

Q. And did you put up any money? A. I put up some money, just the exact amount I don't know.

Q. Did Burns at that time tell you where the bonds came from? A. At no time, to the best of my knowledge and recollection.

Q. Did you have any conversations with George Turley with regard to the investigation of this matter? A. I don't know—I think I did once. That Blaser & Ingalls came over to 15 William Street looking for me.

Q. How long ago was that? A. About two and a half years ago, three years ago.

Q. Did you have any recent conversations with Peter Burns or George Turley with regard to Blaser & Ingalls? A. I haven't seen George Turley in upwards of two and a half years and talked to him.

Q. How about Peter Burns? A. I have seen Peter Burns—well, I may see him today and I may not see him for weeks.

1136

Q. You have seen him within the past week, have you not? A. I have seen him within the past—I think, yes, I have seen him maybe half a dozen times within the past week.

Q. You called at 15 William Street at the office to get your mail, did you not? A. Not every day.

Q. Did you call there today? A. I did.

Q. Did he say anything to you? A. Peter Burns I did not see today.

Q. Did you see Peter Burns yesterday? A. I did.

1137

Q. Did he say anything to you yesterday? A. He said that Blaser & Ingalls wanted to talk to him.

Q. Did he tell you why they wanted to see you? A. He did not.

Q. Did he mention anything about this transaction? A. He did not.

Q. Whose idea was it to prepare that letter of February 5, 1937? A. Blaser & Ingalls.

Q. With whom did they discuss that? A. It is the common procedure and practice of a security house not to buy or sell any security unless they get a written confirmation.

1138

*Government's Exhibit 69*

Q. Are you acquainted with one Herbert Jacobson? A. I met Herbert Jacobson, as has been explained by me to Mr. Milenky; that sometime in January 1937, I met Jacobson.

Q. Did you talk to Jacobson about any Minnesota Ontario Paper Co. 5-year, 6% gold notes? A. Not to my recollection.

Q. Do you know whether Herbert Jacobson had anything to do with the disposal of such notes? A. That I do not know.

1139

Q. Have you ever talked to anybody about it? A. I have no knowledge of any such transactions. I did say to you that I had lunch one time with Jacobson.

Q. Did you ever have any business dealings with Jacobson? A. No.

Q. Who introduced you to Jacobson? A. Turley.

Q. Was it around the same time that the transaction you were talking about with regard to these Minnesota Ontario Paper Co. gold notes was taking place? A. It must have either been before or shortly thereafter because I haven't seen George Turley in upwards of two and a half years.

1140

Q. Have you ever used any other name besides the name of Chester G. Bollenbach? A. In what way do you mean by that?

Q. Have you ever used any other name but your own name? A. Where any deals that I am personally involved in, the only name that I use is Chester G. Bollenbach.

Q. Did you ever use the name of T. R. Johnson? A. Never.

Q. Did you ever use the name of Robert C. Wilson? A. Those are all new names to me.

Q. Have you ever been to Wilmington, Delaware? A. Yes.



## Government's Exhibit 69

1141

Q. When? A. In 1938.

Q. Were you in Wilmington, Delaware in 1936? A. I have been in Wilmington practically every year.

Q. But were you there in 1936? A. I believe I was.

Q. Did you have occasion to visit the Chancery Court in Wilmington, Delaware in 1936? A. I have visited the Chancery Court and the different courts throughout the eastern seaboard. When I say the eastern seaboard—from Washington to Boston, in my reorganization work.

Q. Were you in Wilmington, Delaware during the latter part of 1935? A. That I can't say.

1142

Q. Mr. Bollenbach, I inform you that in the latter part of 1935, twenty \$1,000 General Theatre Equipment Bonds, 6's, due in 1940, were stolen from the Register's office of the Chancery Court of Wilmington, Delaware, and ask you whether or not you took those bonds. A. You are asking me to make an admission. To the best of my knowledge and recollection, I did not take any bonds out of Wilmington in December or whatever it was in 1935.

Q. A short time ago, didn't you tell Mr. Keating and me that you did take those bonds? A. I didn't use those exact words.

Q. Well, what words did you use? A. You and Mr. Keating spoke about bonds being missing in Wilmington.

1143

Q. Yes? A. And at that time you said that you had investigated that I had some part—these may not be your exact words—with some bonds in Wilmington.

Q. Well, did you have any part either in the theft or disposition of such bonds? A. In fairness to the matter that is under investigation, Mr. Milenky, I ask that the cause that you are now investigating be adhered to.

Q. I will repeat the same question. Did you or did you not have anything to do either with the theft or disposition of those bonds from Wilmington, Delaware? A. I personally did not remove bonds out of Wilmington, Delaware.

1144

*Government's Exhibit 69*

Q. Did you have anything to do with their disposition?

A. I participated in the disposition of bonds.

Q. That were stolen in Wilmington, Delaware? A. Where they came from, I don't know.

Q. What kind of bonds were they? A. That I don't know.

Q. Were they General Theatre Equipment Bonds? A. Mr. Milenky, if you say they were General Theatre Equipment Bonds, I have to say yes.

1145

Q. Well, were they? A. What bonds they were, I do not know because I have no recollection of any transaction now in Wilmington.

Q. Well how did you participate in the disposition of bonds that you have in mind? A. Whatever bonds I participated in, I have always arranged the sale of them. When I say the sale—the confirmations.

Q. Is the name Robert C. Wilson familiar to you? A. No, it is not.

Q. Is the name T. R. Johnson familiar to you? A. It is not.

1146

Q. Isn't it a fact that these names were used in the disposition of General Theatre Equipment Bonds? A. That I can't tell you.

Q. Did you ever have an account at the National Safety Bank & Trust Co. in New York? A. Never was in the bank.

Q. How long have you known Fred Blaser? A. Since being introduced to him by George Turley.

Q. At the time the Minnesota Ontario Paper Co. gold notes were being passed? Is that correct? A. That's right.

Q. How long have you known Ernest Dudley Ingalls? A. Same time.

Q. That was the first time you were ever introduced to him? A. The first time I have ever seen him.

Q. Were you introduced to them under your own name?

A. To the best of my recollection, I was. They claim that I wasn't.

Q. Isn't it a fact that Turley introduced you as Mr. Brown? A. I don't know that he introduced me as Mr. Brown. He may have said, we may have used the name of Brown for telephone conversation.

Q. What do you mean you might have used the name of Brown? A. I didn't say that I may have. I say that Turley may have suggested the use of the name of Brown as far as telephone conversations were concerned.

Q. Telephone conversations with whom? A. Between Blaser's office and his office.

Q. In other words, when you called Blaser and Ingalls, you were to say that it is Mr. Brown calling? Is that it? A. I believe so.

Q. Did you register at the Hotel New Yorker under the name of Walter T. Roberts? A. I did not.

Q. Do you know who did? A. I do not.

Q. You know that some one registered there under that name do you not? A. You tell me they did. I don't know who registered.

Q. Isn't that the address that was given for Walter T. Roberts in the letter purporting to be written by Walter T. Roberts and asking that Messrs. Blaser & Ingalls sell the Minnesota & Ontario Paper Co. bonds or gold notes? A. From the letter of February 5th, yes.

Q. Did you take this letter to Blaser & Ingalls? A. I wouldn't say that I did and I wouldn't say that I didn't. My memory does not serve me whether I delivered that letter or not.

Q. At what address was Turley's office located at that time? A. I believe 43rd and Fifth Avenue.

Q. On Fifth Avenue? A. I believe on Fifth Avenue.

1150

*Government's Exhibit 69*

Q. And all these conversations with regard to the matters you discussed here today occurred at that office? Is that correct? A. That's right.

Q. What is George Turley's occupation? A. Attorney. He operated as an attorney and as a stock broker.

Q. Do you know where he is now? A. I haven't seen George Turley in two and a half years.

Q. Do you know where his office is located? A. I do not. I haven't any idea.

1151

Q. Have you talked to George Turley over the telephone recently? A. I haven't talked to George Turley, as I explained before, in upwards of two and a half years. I know in over a year I haven't talked to Turley. That I am positive of.

Q. How did the Minnesota Ontario Paper Co. gold notes described in the letter of February 5, 1937 reach the hands of Blaser & Ingalls? A. There is no question in my mind but I must have delivered those to their office.

Q. Do you know whether or not these fifteen bonds were the only Minnesota Ontario Paper Co. gold notes which Peter Burns had? A. The only bonds that I know and saw that he had were these fifteen bonds.

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Q. Did he ever tell you that he had more of the same issue? A. If he did, he didn't confide in me.

Q. Were you ever in Minnesota? A. I wouldn't know what Minnesota looked like.

Q. Were you ever in Minneapolis, Minn.? A. No, never west of Chicago; and I haven't been in Chicago since 1931.

Q. Mr. Bollenbach, the statement you have just made is entirely voluntary on your part, is it not? A. It is with the point that I want to help clear up a situation.

I have read the foregoing statement consisting of nineteen and one-quarter pages and certify that it is the truth in all respects. I also certify that no threats or promises

## Government's Exhibit 70

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of any nature whatsoever were made to me by anyone in order to induce me to make this statement.

CHESTER G. BOLLENBACH  
Chester G. Bollenbach

Spt 21; 39

Witnessed:

J. D. MILENKY

J. D. Milenky, Special Agent

J. J. KEATING,

J. J. Keating, Special Agent  
Federal Bureau of Investigation

U. S. Department of Justice

607 U. S. Court House

Foley Square

New York, N. Y.

1154

## Government's Exhibit 70

1155

STATEMENT OF CHESTER G. BOLLENBACH MADE IN ROOM 607,  
U. S. COURT HOUSE, FOLEY SQUARE, NEW YORK, N. Y., ON  
SEPTEMBER 8, 1939, FROM 1:15 P. M. to 2:25 P. M.

Present:

J. D. MILENKY, Special Agent

J. J. KEATING, Special Agent

CHESTER G. BOLLENBACH, Witness

PAULINE SHOOPS, Stenographer



1156

*Government's Exhibit 70**By Mr. Milenky:*

Q. What is your name? A. Chester G. Bollenbach.

Q. You are the same Chester G. Bollenbach who made a statement in this office yesterday, are you not? A. Yes.

Q. And at this time, Mr. Bollenbach, you desire to make an additional statement—is that correct? A. I do.

Q. You still understand, Mr. Bollenbach, do you not, that anything you say can be used against you in Court. A. I waive that.

1157 Q. And since yesterday you have had an opportunity to consult with your attorney, have you not? A. That's right.

Q. Now, yesterday, when we were discussing this, Mr. Bollenbach, I inquired of you whether or not you were in Wilmington, Dela., during the latter part of 1935. I ask you that same question again. A. If your records disclose that I was, then I was.

Q. Did you have occasion while in Wilmington, Dela., to visit the Register's office of the Chancery Court there? A. I did.

Q. When was that, to the best of your recollection? A. When the first hearing, or previous to the first hearing, of General Theatres reorganization.

1158 Q. Were you interested in the reorganization of General Theatres? A. Yes.

Q. In what way? A. To examine the plan of reorganization.

Q. And during the course of your visits to the Chancery Court in Wilmington, Dela., did you have occasion to go to the records pertaining to those matters? A. The records were given to me.

Q. Now, what did these records consist of? A. All proofs of claims.

Q. Did they include any securities? A. They did.

Q. What kind of securities? A. Bonds.

Q. How many bonds? A. That I don't know.

Q. Can you recall the name of the bonds? A. General Theatres.

Q. In what denomination were these General Theatre bonds? A. I don't know.

Q. Were they \$500 bonds? A. I don't know.

Q. Were they \$1,000 bonds? A. That I don't know; I believe they were \$1,000 bonds.

Q. Perhaps I can refresh your recollection—were they General Theatre Equipment Bonds, 6%, due 1940? A. What the interest rate was and the year they were due, I don't remember.

Q. Did you take possession of any of these bonds? A. I took 20 of them.

Q. Did anyone give you permission to take them? A. No.

Q. What did you do with them after you took them? A. I delivered them to Peter Burns.

Q. Where did this delivery take place? A. Wilmington, Dela.

Q. Where in Wilmington, Dela.? A. That I don't know sure.

Q. Were you registered at a hotel in Wilmington at the time? A. I never was registered in Wilmington.

Q. Where were you staying when in Wilmington? A. I just went in and out again.

Q. Was Peter Burns registered in any hotel in Wilmington, Dela. at the time? A. I don't believe so, I won't say yes or no.

Q. At the time you were in Wilmington, Dela., did you go there with Peter Burns? A. No, I think he was in Philadelphia and I met him there.

Q. You met him in Wilmington? A. In Wilmington.

Q. Was he down there on business? A. Yes.

Q. He didn't come there at your request? A. No.

Q. When you delivered the 20 bonds to Peter Burns in

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*Government's Exhibit 70*

Wilmington, Dela., did you tell Peter Burns where you obtained them? A. I must have.

Q. And what did Peter Burns say? A. I don't know that he said anything.

Q. Why did you give them to Peter Burns? A. Because he was going back to New York.

Q. And what was Peter Burns to do—hold these bonds for you? A. Dispose of them.

Q. Did you discuss with Peter Burns the matter of disposing of them? A. We must have discussed the matter prior to my delivering the bonds to him.

1163

Q. And can you tell me what the substance of the conversation was? A. That I can't. Time has elapsed and my memory is not clear of any conversations.

Q. Now, when did Peter Burns return to New York from Wilmington, Dela.? A. Either that day or the next day.

Q. Did you go back to New York also? A. No.

Q. What did you do? A. I think I either went to Baltimore or Washington.

Q. And how long did you stay in Baltimore or Washington? A. A couple of days.

1164

Q. Did you register at a hotel in either Baltimore or Washington? A. I was either at the YMCA or some rooming house but where it was, I can't tell you.

Q. Now, after leaving Baltimore or Washington, where did you go? A. I returned to New York.

Q. Did you see Peter Burns when you returned to New York? A. I did.

Q. Did you talk about the bonds you had given him? A. He told me he had disposed of them.

Q. Did you get any money from Peter Burns at that time? A. I don't believe the bonds were delivered at that time, on that sale.

Q. What happened? A. I believe they were held and sold later.

Q. Who held them? A. I don't know whether Burns held them or I held them or they laid in the office.

Q. How soon afterwards were the bonds sold? A. From the time of the first inception of the bonds until disposition of the bonds, may be four, five months elapsed. That I don't know; may be four or five days.

Q. But ultimately the bonds were sold? A. That's right.

Q. Who sold them? A. Either Burns sold them or I sold them.

Q. How was this sale effected? A. That I can't tell you.

Q. Through a brokerage house? A. Yes.

Q. Well, did you use your own name in selling these bonds? A. No.

Q. Did you make the telephone call? A. That I don't know. I don't believe so.

Q. Did Burns make the telephone call? A. I think he did.

Q. At any rate, you are positive either you or Burns made a call to a brokerage house? A. To the best of my recollection I would say "yes."

Q. And at the time that the telephone call was made, if you made it, you did not use your right name, and if Burns did, he likewise used an assumed name. Is that correct? A. No, we may have used our own names and said we were simply sending it in for an account.

Q. Do you recall how much was realized from the sale of these bonds? A. I do not.

Q. I show you a check dated December 20, 1935, bearing the number 66,036, payable to the order of T. R. Johnson, in the sum of \$1,858.45, drawn on the Chase National Bank of the City of New York, Mercantile Branch, 115 Broadway, issued by the firm of Watson & White, 149 Broadway, and ask whether you can identify it? (passes check) A. I can't.

Q. Does that check recall anything to your mind? A. It does not.

1168

*Government's Exhibit 70*

Q. I call your attention to the endorsement on the back of this check, namely, "T. R. Johnson", following which is typed "Pay to the order of National Safety Bank & Trust Company, Robert C. Wilson", and ask whether that recalls anything to your mind? A. It does not.

Q. Is that signature "T. R. Johnson" in your handwriting? A. It is not.

Q. Is it in the handwriting of Peter Burns? A. From my knowledge of Peter Burns' writing, it does not purport to be his.

1169

Q. Does the name of Watson & White mean anything to you? A. No, excepting that they are brokers.

Q. Is that the brokerage house through which the bonds which you gave to Peter Burns were passed? A. That I can't tell you offhand because I can't remember.

Q. I show you another check issued by the same firm of Watson & White, 149 Broadway, bearing the number 65,975, dated December 18, 1935, payable to the order of T. R. Johnson in the sum of \$1,870.96, drawn on the same bank, and ask you whether or not you can identify that check? (Passes check) A. I can't.

1170

Q. Did you ever open an account at the National Safety Bank & Trust Company? A. I never was in the bank.

Q. Do you know whether Peter Burns ever opened an account in that bank? A. Not to my knowledge.

Q. Does National Safety Bank & Trust Co. refresh your recollection? A. I know there was such an account opened.

Q. For what purpose? A. For the clearing of these checks.

Q. How do you know that? A. From the checks that had been displayed here today.

Q. At the time that those bonds were being disposed of, did you and Peter Burns have any conversation relative to the opening of such an account? A. I should say "yes".

Q. Do you know who took the part of Robert C. Wilson? A. It may have been some innocent messenger.



Q. Do you know who took the part of T. R. Johnson?

A. It may have been the same signature.

Q. But that was the scheme that was used in disposing of the bonds, was it not? A. Offhand, I would say yes; I am trying to reconstruct the picture, how the mechanics of this—

Q. Does that recall the amount of money that was realized from the sale of these 20 General Theatre Equipment Bonds? A. It does not.

Q. What is your best recollection of the amount of money that was realized from their sale? A. Being that you have displayed these checks in the aggregate sum of \$3,729.41, I would say, offhand, that that was the amount that was realized.

1172

Q. Now, who received payment from the sale of these bonds? A. I did and Burns.

Q. How did you receive the money? A. In cash.

Q. Did you receive the cash in person? A. No.

Q. How did you obtain it from the brokerage house?

A. I didn't obtain it from the brokerage house.

Q. What I mean is this, Mr. Bollenbach: how was the money, in payment for the bonds, obtained from the brokerage house where these bonds were passed? A. That is a complicated question. As has been stated before, an account was opened at the National Safety Bank & Trust Co. and that was used as a vehicle to clear the brokerage checks.

1173

Q. Who took the cash—did you take the cash first or did Peter Burns? A. Peter Burns.

Q. And who gave you your share? A. I don't know whether he brought it all there and I distributed it, or whether he took his portion, took some of it, and he distributed it. As a matter of being fair to Burns, I believe I should say that I took it.

1174

*Government's Exhibit 70*

Q. I don't want you to say anything that is not a fact; I want you to give me your best recollection of what did occur. A. To the best of my recollection and belief, I must have been the distributing agent.

Q. And amongst whom was that money distributed? A. Amongst Burns and I.

Q. How did you split that money? A. I would say, off-hand, I got the bulk.

Q. About how much did you get? A. Between 2500 and 3000.

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Q. And Burns got the rest? A. Yes.

Q. Now, how did you know, when you first approached Burns with these bonds, that Burns would enter into such a transaction? A. I shared for a great number of years, and was very close to Peter Burns, and it would be nothing on my part or his part to come to me with any kind of a deal.

Q. Had you ever had any similar dealings with Burns? A. To the best of my recollection, I did not.

Q. Had you ever engaged in a similar transaction yourself? A. To the best of my recollection, I did, in a small way.

1176

Q. How long ago? A. 8, 9 years ago.

Q. With whom? A. I don't know.

Q. Do you know what kind of bonds were involved? A. I don't know.

Q. Or the amount? A. I don't; it was picayune, whatever it was.

Q. Yesterday, you discussed with Mr. Keating and me a matter pertaining to the disposal of fifteen \$1,000. Minnesota Ontario Paper Co. 5 Year 6% Gold Notes due March 1, 1931. A. I discussed the \$15,000 Minnesota Ontario Paper bonds.

Q. And these are the bonds or gold notes, mentioned in the letter of February 5, 1937, written on the stationery of

the Hotel New Yorker, addressed to Messrs. Blaser & Ingalls, 32 Broadway, New York, N. Y., which letter is signed "Walter T. Roberts"? A. That's right.

Q. And yesterday you told us that you obtained these bonds, or gold notes, from Peter Burns. Is that correct? A. Yes.

Q. Now, will you tell us again how you happened to enter into that transaction? A. Sometime in the month of January, 1937, Burns advised me that he had 15,000 Minnesota Ontario Paper Co. bonds and wanted to dispose of them.

Q. Did he indicate to you where he had obtained these bonds? A. Off-handed; and from my best recollection, he did not but I knew that he had been in Chicago so I assumed that he got them there.

Q. Did he indicate to you whether or not these bonds were stolen? A. He did not.

Q. Did you know that they were stolen? A. I didn't know they were stolen until later.

Q. But he did tell you later that the bonds had been stolen; is that correct? A. Yes.

Q. When did he tell you that? A. I believe after the bonds had been sold or during the consummation of the selling of the bonds.

Q. Now, what transpired when Burns told you that he had 15 Minnesota Ontario Paper Co. bonds; what was the substance of your conversation with Burns? A. Burns said that he had these bonds and he wanted to dispose of them and at that time I suggested we go to George Turley's office and either he telephoned Turley or I; and we both went to Turley's office together.

Q. When you went to Turley's office, did you take the bonds with you? A. I doubt it.

Q. In Turley's office, did you tell Turley about the bonds? A. Yes.

1180

*Government's Exhibit 70*

Q. What did you tell him? A. Either Burns or I told him that there were some bonds that had to be disposed of.

Q. Did you tell him what kind of bonds? A. I presume we did.

Q. Did you tell him that they were stolen bonds? A. No question in my mind that he knew the origin of the bonds.

Q. How do you know that? A. Because I think we explained, or Burns explained, how we got these bonds.

1181 Q. And what is your best recollection as to Burns' explanation as to how he got these bonds? A. That he brought them in from the West.

Q. That he stole them? A. I wouldn't exactly use those words, but from what I can gather, that would rather definitely express it.

Q. And what did Turley say about disposing of these bonds? A. That he had a firm that could.

Q. Did he tell you the identity of that firm? A. Blaser & Ingalls.

Q. What did Turley say about the manner in which these bonds would be disposed of? A. He said Blaser & Ingalls were to sell them.

1182 Q. Did he get in touch with Blaser & Ingalls? A. They were in his office.

Q. Oh, when you arrived with Burns, Blaser and Ingalls were already there? A. I don't know whether they were already there or came in behind us.

Q. And did you and George Turley and Peter Burns and Ernest Dudley Ingalls and Blaser discuss that situation at the time? A. I would say, off-handed, yes.

Q. And the scheme that was finally arrived at was to make it appear that an individual by the name of Walter T. Roberts was the owner of the bonds and desired to sell them? A. The plan of modus operandi was entered into. Just exactly what names were to be used, I don't know.

Q. But what names were finally used? A. The name finally concocted, which is a good word, I think, was Walter T. Roberts.

Q. And as a result of that "concocting" this fictitious individual, the letter of February 5, 1937, which you identified yesterday, was written? A. Came into existence.

Q. Now, do you know who typed it? A. I do not.

Q. In whose handwriting is the signature of Walter T. Roberts? A. I do not know, but definitely know it is not my handwriting as I supplied you with specimens of my handwriting yesterday.

1184

Q. Now, as part of the scheme in creating the fictitious individual, namely, Walter T. Roberts, was an address given for Walter T. Roberts? A. The Hotel New Yorker was used as the address for Walter T. Roberts.

Q. Did you go to the Hotel New Yorker and register there? A. I did not.

Q. Did George Turley go to the Hotel New Yorker? A. I believe not.

Q. Did Peter Burns go to the Hotel New Yorker? A. I would say yes.

Q. Do you know whether or not Peter Burns registered there as Walter T. Roberts? A. I have no knowledge.

1185

Q. Do you know whether anyone registered there as Walter T. Roberts? A. I have no knowledge.

Q. But you do know that Peter Burns went to the Hotel New Yorker? A. Yes.

Q. Why did Peter Burns go to the Hotel New Yorker? A. In order that there should be an address for one Walter T. Roberts.

Q. Then that was his purpose in going to the Hotel New Yorker? A. That's right.

Q. But you do not know whether he is the person who registered as Walter T. Roberts or not? A. I do not.

Q. Did you ask him? A. No, I did not.



1186

*Government's Exhibit 70*

Q. Did he bring back any stationery of the Hotel New Yorker? A. He brought blank letterheads.

Q. Of the Hotel New Yorker? A. That's right.

Q. And it was on one of the blank letterheads that the letter of February 5, 1937, which you identified, was written? A. That's correct.

Q. Now, did there come a time when you inquired of Peter Burns how he obtained these Minnesota Ontario Paper Co. bonds? A. No.

Q. Did he ever tell you? A. I don't recall that he did.

1187

Q. Do you know whether or not these 15 bonds which you and Peter Burns and George Turley succeeded in passing through the firm of Blaser & Ingalls were the only bonds of the same issue which Peter Burns had? A. I believe there were 25,000 in the lot.

Q. Do you know what happened to the other ten? A. The ultimate disposition of the other ten I do not know but have heard that they were sold through Herbert Jacobson.

Q. Where did you hear that? A. From Burns.

Q. You mean Peter Burns told you? A. That's right.

Q. Can you remember the substance of the conversation? A. They were sold about the same time the 15 bonds were sold through Blaser & Ingalls.

1188

Q. Did you ever talk to Jacobson? A. I believe I explained that in the statement I made yesterday.

Q. Will you explain it again? A. I believe that just about this time Burns, Turley, Jacobson and I had lunch together and the sale of some additional bonds were discussed.

Q. You mean some additional Minnesota Ontario Paper Co. gold notes? A. That's right.

Q. Do you remember what Jacobson had to say about it? A. That he had a source where he could dispose of them.

Q. Did he dispose of any? A. I don't know.

Q. Did you receive any cut? A. I did not, or I did not participate in any of the transactions.

Q. Do you know what vehicle was used in disposing of these bonds? A. I do not.

Q. Now, how much did you get from the sale of the 15? A. I think the net proceeds to me was about \$1100, of which I don't just recall what I gave back, either \$100 or \$200 I gave to Burns, who I understand was going to give the same to George Turley on behalf of Blaser & Ingalls.

Q. Why was this kick-back made? A. There had to be attorneys engaged to defend Blaser and Ingalls.

Q. Did you talk to Turley about that? A. I would say, off-handed, yes.

Q. What did Turley say? A. He said some cash had to be raised so these boys could be defended.

Q. Who was to take care of the defense? A. Some attorney that Blaser and Ingalls would engage.

Q. Turley was not going to act as attorney? A. Off-hand, I would say no.

Q. Do you know how much Turley got as his cut? A. I don't know what he gave out of his cut to Blaser and Ingalls so I am not at liberty to prognosticate—I would not say prognosticate—estimate what his final cut was.

Q. How much did Peter Burns get? A. About the same as Turley.

Q. You were present when he got that? A. Yes.

Q. And that took place in Turley's office? A. Yes.

Q. At 521 Fifth Ave., New York City? A. I don't know whether that is the number, wherever Turley's office is, on Fifth Avenue, at the time this transaction—

Q. Was there any reason that you know of why the ten bonds which Peter Burns and George Turley disposed of through Jacobson could not have been disposed of through Blaser & Ingalls? A. I can't answer that question because I don't know.

1192

*Government's Exhibit 70.*

I have read the above statement consisting of 15½ pages, of which this is the last, and certify that it is the truth in all respects. I also certify that no threats or promises of any nature whatsoever were made by anyone in order to induce me to make this statement.

CHESTER G. BOLLENBACH  
Chester G. Bollenbach

Spt. 22, 1939

1193

Witnesses:

J. D. MILENKY

J. D. Milenky

CHARLES L. GREEN

Special Agents, Federal Bureau of Investigation,  
U. S. Department of Justice,  
607 U. S. Court House, Foley Square,  
New York, N. Y.

1194

**Government's Exhibit 71**

1195

Receipt by Peter W. Burns dated September 11, 1939  
for property he had turned over to the F. B. I.

**Defendant's Exhibit A**

Diagram of Clerk's office in United States Court House  
in Minneapolis.

1196

**Defendant's Exhibit B**

Picture of the defendant Burns.

**Defendant's Exhibit C for Identification**

Pages of note book of witness, McDougall.

1197

**Defendant's Exhibit D for Identification**

Specimens of witness Mason's writing "T. R. Johnson".

1198

**Defendant's Exhibit E****HOTEL GRAEMAR****JAMES COONEY, Manager  
SHAMOKIN, PA.**

Feb 1st.

Dearest

1199

Arrived in Shamokin at 7 PM left newark 1 50 PM covered about 170 miles through beautiful country and was sorry you were not along as you would have enjoyed the views.

Was out at the brewery to-night. Met the Brewmaster and to-morrow morning will visit the office & the brewery

This town has about 50,000 people

The large head lights of the car went out—remember our trip to Bear Mountain—but rode into town behind another car down over the Mountains and arrived in Shamokin O.K.

1200

It is now 11 PM and I am going to bed

Love

CHESTER

"Envelope postmarked, Shamokin, Pa., Feb. 2, 1937, 8 A. M."



**Defendant's Exhibit F**

Certified copy of order of United States District Court, District of Minnesota, Fourth Division, dated October 31, 1934, in the matter of Minnesota and Ontario Paper Company, Debtor, in Consolidated Proceedings for reorganization of the corporation, which provided:

1. For the filing of claims in bankruptcy proceeding.
2. That proofs of claim on the five year gold notes due March 1, 1931 could be filed either by the Noteholders Protective Committee or by the individual holders of such notes, and that proofs of claim also filed in the prior receivership proceeding should be deemed filed in the bankruptcy proceeding.
3. That all proofs of claim shall be deemed allowed unless the Trustees or other parties in interest shall file objections prior to January 21, 1935.
4. Attached to the order is a certification under the hand and seal of the Clerk of the Court, dated November 17, 1942, to the effect that no objections were ever filed to any claims based on the 6% gold notes of the debtor due March 1, 1931.

1202

1203

1204

**Stipulation and Order as to Exhibits****UNITED STATES CIRCUIT COURT OF APPEALS****FOR THE SECOND CIRCUIT****C 106-171****[SAME TITLE]**

1205 IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties herein, subject to the approval of the Court, that Government's Exhibits 2 to 11 inclusive; 13; 16 to 22 inclusive; 24 to 26 inclusive; 29 to 31 inclusive; 33 to 36 inclusive; 41; 46; 47; 49 to 61 inclusive; 63 to 68 inclusive; and 71; and Defendant's Exhibits A; B; C; D and F need not be printed in their entirety, but that the transcript of the record herein shall contain brief descriptions thereof; and that all or any part of said Exhibits may be referred to on the argument of the appeal or in the briefs of the parties with the same force and effect as if printed in the transcript of record in full.

Dated: April 22, 1943.

1206

WELLMAN, SMYTH, LOWENSTEIN & FENNELLY,  
Attorneys for Defendant-Appellant,  
Chester G. Bollenbach.

MATHIAS F. CORREA,  
United States Attorney for the Southern  
District of New York, Attorney for Appellee.  
per R. R. DANN.

Sgd.

JEROME N. FRANK,  
U. S. C. J.

**Judgment Appealed From**

1207

**DISTRICT COURT OF THE UNITED STATES****SOUTHERN DISTRICT OF NEW YORK**

C. 106/171

Violation of U. S. C. Title Secs. 88 Title 18 USC Con-  
spiracy to transport stolen bonds in interstate commerce.

[SAME TITLE]

1208

**JUDGMENT AND COMMITMENT**

On this 30th day of November 1942, upon the proceed-  
ings heretofore had herein and on motion of the United  
States Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby  
committed to the custody of the Attorney General or his  
authorized representative for imprisonment in an institu-  
tion to be designated by the Attorney General or his au-  
thorized representative for the period of Two Years and  
Fined \$10,000. on count two.

1209

IT IS FURTHER ORDERED that defendant stand committed  
until fine is paid or he is otherwise discharged by due course  
of law.

IT IS FURTHER ORDERED that the Clerk deliver a certified  
copy of this judgment and commitment to the United States  
Marshal or other qualified officer and that the same shall  
serve as the commitment herein.

GROVER MOSCOWITZ,  
United States District Judge.

1210

**Notice of Appeal and Grounds of Appeal****DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]***Name and Address of Appellant*

Chester G. Bollenbach, 663 - 60th Street, Brooklyn, New York.

1211. *Name and Address of Appellant's Attorneys*

Wellman, Smyth, Lowenstein & Fennelly, 25 Broad Street, New York, N. Y.

*Offense*

Conspiracy to transport or cause to be transported in interstate commerce securities of a value of Five Thousand Dollars (\$5,000.) or more.

*Date of Judgment.*

November 30, 1942.

1212

*Brief Description of Judgment or Sentence*

Imprisonment for two (2) years and Ten Thousand Dollars (\$10,000.) fine.

*Name of Prison Where now Confined, if not on Bail*

Federal Detention Headquarters, 427 West Street, New York, N. Y.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Cir-

*Notice of Appeal and Grounds of Appeal*

1213

quit from the judgment above mentioned, on the grounds set forth below.

Dated: December 2, 1942.

CHESTER G. BOLLENBACH,  
Appellant.

GROUND OF APPEAL

1. The Court erred in denying the defendant's motion to dismiss the indictment at the close of the Government's case on the ground that there was not sufficient evidence to justify the submission of the case to the jury.

1214

2. The Court erred in denying the defendant's motion to dismiss the indictment at the close of the entire case on the ground that there was not sufficient evidence to justify the submission of the case to the jury.

3. The judgment is based upon a verdict which is contrary to the evidence.

4. The Court erred in admitting incompetent and immaterial evidence, highly prejudicial to the defendant, over the objection and exception of the defendant.

1215

5. The Court erred in charging the jury after the jury had advised the Court that they were hopelessly deadlocked, and in failing to properly instruct the jury, as requested by the defendant.



1216

**Assignment of Errors**

**UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Now comes the defendant, Chester G. Bollenbach, and files the following Assignment of Errors and respectfully shows that error has intervened to his prejudice, to wit:

1217

1. The Court erred in denying defendant's motion for a mistrial on the opening of the prosecutor and exception of the defendant (fol. 21).

"Mr. Reis: Now as the case will be developed, the Government will prove that this was not the first courthouse and clerk's office from which bonds had been stolen by this defendant and others.

Mr. Fennelly: I move right now for the withdrawal of a juror and a mistrial.

The Court: Motion denied.

Mr. Fennelly: Exception."

1218

2. The Court erred in denying defendant's motion for a mistrial on the opening of the prosecutor, to which exception was taken (fol. 22).

"Mr. Reis: We will also show that the scheme set up by these defendants, there was a scheme by this defendant and others to steal 20 bonds from the Clerk of the Chancery Court in Wilmington, Delaware, 20 bonds of the General Theatre Equipment Company.

Mr. Fennelly: I renew my motion. The prosecutor has no right to say that. I respectfully move for the withdrawal of a juror.

*Assignment of Errors*

1219

The Court: Denied.

Mr. Fennelly: Exception."

3. The Court erred in permitting the Government to introduce in evidence Government's Exhibit 3, being photostatic copies of gold notes of Minnesota and Ontario Paper Company over the objection and exception of the defendant (fol. 39).

"Mr. Reis: I offer these photostatic copies in evidence.

Mr. Fennelly: Object to them as incompetent. 1220

The Court: Same ruling.

Mr. Fennelly: No foundation laid. Exception.

The Court: Taken subject to connection.

(Marked Government's Exhibit 3.)"

4. The Court erred in permitting the witness Bauer to give the following testimony over the objection and exception of the defendant (fol. 201).

"Q. Do you know anything about the \$1200 cash deposit made by Peter Burns on or about February 14 or 15, 1937?

1221

Mr. Fennelly: I object to it. The witness has already answered.

The Court: Overruled.

Mr. Fennelly: Exception."

5. The Court erred in permitting the witness Hipkins to give the following testimony over the objection and exception of the defendant (fols. 240-241).

"Q. Will you tell his Honor and the jury the facts pertaining to that trade, to the best of your recollec-

1222

*Assignment of Errors*

tion? A. I will. I received a telephone call from a gentleman who gave his name as Arnold Berendson.

Q. Can you place the time? A. Possibly January 31 or February 1 of 1937. He asked me for the quotation on those Minnesota & Ontario Paper gold notes.

Mr. Fennelly: I object as incompetent.

The Court: I will take it subject to a motion to strike.

Mr. Fennelly: Exception."

1223

6. The Court erred in permitting the witness Schnapp to give the following testimony over the objection and exception of the defendant (fol. 362):

"Q. Opened in whose name? A. Opened in the name of Robert C. Wilson.

Mr. Fennelly: I object.

The Court: Subject to connection.

Mr. Fennelly: I think we might as well discuss it with your Honor now. I think it will save time.

The Court: Come up and bring your book.

(The following proceedings were had not in the presence of the jury.)

1224

Mr. Fennelly: I assume Mr. Reis is starting to go into and show similar transactions.

The Court: What is your point?

Mr. Reis: This was the account used to clear the 20 bonds stolen from the Court of Chancery at Wilmington, Delaware, and in this proceeding to show the same intent in this case.

Mr. Fennelly: I would like to call your Honor's attention to the law of this circuit. The cases hold that where you can show a similar act is an exception to the general rule; and you can only show them

in cases where the act done may be either innocent or unlawful, depending upon whether the intent is that it was bad or good.

In this case that is not so. If Mr. Bollénbach transported or caused stolen bonds to be transported, that can only be unlawful. There cannot be anything innocent about it.<sup>3</sup> So there is no occasion to show a similar act or to show intent. If he knows about those things and had taken or transported those bonds or was a part of the conspiracy to do it, there can only be one thing, and that is that it is unlawful and a crime.

1226

I refer in my brief to the case of *Harvey v. The United States*, 23 Fed., 2nd, and other cases, all in this circuit, on the same subject matter.

It is so important that I ask your Honor to give it careful consideration before you admit any testimony about it.

Mr. Reis: The Seaman case, which is more recent, says that you can show the transaction, so does the *Crimmins* case.

Mr. Fennelly: In the Seaman case they held that it was the same conspiracy (handing brief to the Court).

1227

The Court: I will receive it on the ground of intent. I am familiar with those cases.

Mr. Fennelly: Your Honor will overrule my objection?

The Court: Yes.

Mr. Fennelly: Exception."

7. The Court erred in permitting the Government to introduce in evidence Government's Exhibit 17, being a check of Watson & White to T. R. Johnson, dated December

1228

*Assignment of Errors*

18, 1935, over the objection and exception of the defendant (fols. 382-383).

"Mr. Reis: I offer this check in evidence (handing to Mr. Fennelly). What number will that be, Mr. Clerk?"

The Court: That will be 17.

Mr. Fennelly: Objected to as immaterial and irrelevant and incompetent, and as having no bearing in this case.

1229

The Court: That is the objection you urged at the bench yesterday.

Mr. Fennelly: Yes, in connection with it.

The Court: You mean it charges something else?

Mr. Fennelly: Yes, and not in connection with this defendant, as shown—

The Court: I will take it subject to a motion to strike.

Mr. Fennelly: Exception

(Marked Government's Exhibit 17.)"

1230

8. The Court erred in permitting the Government to introduce in evidence Government's Exhibit 18, being a deposit ticket of the National Safety Bank showing the deposit of Exhibit 17, over the objection and exception of the defendant (fol. 384).

"Mr. Reis: I offer it in evidence. That will be 18 (handing to Mr. Fennelly).

The Court: That is the deposit slip?

The Witness: Yes.

Mr. Fennelly: Same objection (handing to Court).

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 18.)"



*Assignment of Errors*

1231

9. The Court erred in permitting the Government to introduce in evidence Exhibit 19, being a check of Watson & White to T. R. Johnson, dated December 20, 1935, over the objection and exception of the defendant (fol. 385).

"Mr. Reis: I offer this check in evidence.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 19.)"

1232

10. The Court erred in permitting the Government to introduce in evidence Government's Exhibit 20, being a deposit ticket of the National Safety Bank showing the deposit of Exhibit 19, over the objection and exception of the defendant (fol. 388).

"Mr. Reis: I offer it in evidence.

Mr. Fennelly: The general objection, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 20.)"

1233

11. The Court erred in permitting the Government to introduce in evidence Government's Exhibit 21, being a check of Robert C. Wilson, dated December 20, 1935, over the objection and exception of the defendant (fol. 390).

"Mr. Reis: I offer this check in evidence.

Mr. Fennelly: The general objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 21.)"

1234

## ; Assignment of Errors

12. The Court erred in permitting the Government to introduce in evidence Government's Exhibit 22, being a check of Robert C. Wilson, dated December 23, 1935, over the objection and exception of the defendant (fols. 390-391).

"Mr. Reis: I offer this check in evidence.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 22.)"

1235

13. The Court erred in permitting the witness Jacobson to give the following testimony over the objection and exception of the defendant (fol. 501).

"Q. You had previously put through some security deals for Mr. Turley, prior to this date?

Mr. Fennelly: I object to it.

The Court: Same ruling.

Mr. Fennelly: Exception.

A. Yes, sir.

Q. Harriet Low bonds, is that right? A. Yes.

1236

Mr. Fennelly: I object specifically. If the District Attorney is doing this, he must first show that he has been surprised.

The Court: Overruled.

Mr. Fennelly: Exception."

14. The Court erred in permitting the witness Jacobson to give the following testimony over the objection and exception of the defendant (fol. 526).

"Q. Sometime the latter part of February or the early part of March, 1937? A. I think it was six months afterwards.

*Assignment of Errors*

1237

Q. Did he ask you if you knew who Berendson was?

Mr. Fennelly: I object to it.

The Court: Overruled.

Mr. Fennelly: It is not and could not be a part of the conspiracy—

A. I believe he did.

Mr. Fennelly: —on the element of time. Exception.

Q. What was your answer to that representative?

1238

A. I did not tell him.

Q. You did not tell him what? A. I told him I did not know who Berendson was.”

15. The Court erred in permitting the witness Blaser to give the following testimony over the objection and exception of the defendant (fols: 627-628).

“Q. After Brown left the office did you and Ingalls and Turley have a conversation? A. Yes, we did.

Q. What was that conversation?

Mr. Fennelly: I object to it as incompetent.

1239

The Court: The same ruling.

Mr. Fennelly: Exception.

Q. What was the conversation? A. I beg your pardon.

Mr. Fennelly: May I point out that I do not know whether right after Mr. Bollenbach left him that would be binding on him.

The Court: If he was in on it, it is binding.

Mr. Fennelly: I take an exception.”

1240

*Assignment of Errors*

16. The Court erred in permitting the witness Blaser to give the following testimony over the objection and exception of the defendant (fols. 657-658).

Q. When Ingalls got back did he tell you where he was? A. Yes.

Q. Where did he tell you? A. He said to Turley's office with the money.

Mr. Fennelly: I object to that.

The Court: Overruled.

Mr. Fennelly: Exception.

1241

Q. Did he tell you what took place at Turley's office? A. Yes, he told me an incident that took place.

Q. What did he tell you?

Mr. Fennelly: I object to that.

The Court: Overruled.

Mr. Fennelly: That is not something in furtherance of it. This narrates the course of the events.

The Court: Overruled.

Mr. Fennelly: Exception.

A. As soon as he got to Turley's office—

1242

Q. This is what Ingalls told you? A. Yes. When Miss Case saw him he told her to let Mr. Turley know he was there. She did that. The man was told to go into his private office. When he got there, as he got to the main office he saw an individual sitting there whom he recognized from the street. Ingalls went in—

Mr. Fennelly: May I take the liberty of enlarging on my motion and stating that it is pure hearsay and what happened is not in furtherance of anything.

The Court: Denied.

Mr. Fennelly: Exception.

The Court: Go ahead."

*Assignment of Errors*

1243

17. The Court erred in permitting the witness Blaser to give the following testimony over the objection and exception of the defendant (fols. 663-664).

"Q. When was that? A. The latter part of April, 1937.

Q. Did you have a conversation with Turley? A. Yes, sir, we did, both of us.

Q. What did you say to him? What did you tell Turley? A. We told Turley that A. E. Ames & Company had informed us that the bonds had been stolen.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception."

1244

18. The Court erred in permitting the witness Blaser to give the following testimony over the objection and exception of the defendant (fols. 685-686).

"Q. Do you remember Turley saying, 'You better keep your mouth shut or you will all go to jail'? A. Yes.

Q. When was that?

Mr. Fennelly: I move to strike that out as not binding on the defendant.

The Court: Denied.

Mr. Fennelly: Exception."

1245

Q. When was that, Mr. Blaser? A. On or about this time in May, 1937."

19. The Court erred in permitting the witness Blaser to give the following testimony over the objection and exception of the defendant (fols. 687-688).

"Q. You knew there was something wrong if you cleared bonds taken in a switch? A. Yes.



1246

*Assignment of Errors*

Mr. Fennelly: I move to strike it out.

The Court: Overruled.

Mr. Fennelly: Exception."

20. The Court erred in permitting the witness McDougall to give the following testimony over the objection and exception of the defendant (fols. 769-771).

"Q. Was there a proceeding in that court known as the General Theatre Equipment, Inc.? A. Yes.

Q. 1935? A. Yes.

1247

Q. What was that proceeding? A. It was a receivership that was filed in our court.

Q. Did any holders of bonds or notes of that corporation file them with the proofs of claim in your court? A. Yes.

Mr. Fennelly: I object to this as incompetent, irrelevant and immaterial.

The Court: Same ground, is it?

Mr. Fennelly: The same as we discussed, yes.

The Court: Overruled.

Mr. Fennelly: Exception.

1248

Q. I show you this paper dated December 28, 1932, and ask you what that is? A. That is a proof of claim filed by Mr. Crowder in General Theatres for 20,000 shares of stock."

21. The Court erred in permitting the Government to introduce in evidence Government's Exhibits 64 and 65 over the objection and exception of the defendant (fols. 773-776).

"Mr. Fennelly: Same objection. I have not seen it.

The Court: Same ruling.

Mr. Reis: You haven't seen this one?

Mr. Fennelly: No.

Mr. Reis: Wait a minute (banding Mr. Fennelly).

(Marked Government's Exhibit 64.)

Mr. Fennelly: Same objection as to this exhibit.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 65.)

22. The Court erred in permitting the witness McDougall to give the following testimony and the line of testimony following from the same subject matter over the objection and exception of the defendant (fols. 779-780). 1250

"The Witness: A man by the name of Johnson came into our office.

Q. Do you recall when? A. November 7, I believe, as near as I can recall, 1935.

Q. Yes. A. And asked to see the file.

Q. Do you see Johnson in the court room? A. I do.

Q. Who is he? A. The gentleman sitting there with the glasses on.

1251

Mr. Reis: Indicating the defendant Bollenbach.

Q. Did you have a conversation with him?

Mr. Fennelly: I have an objection to the entire line so I won't have to jump up every minute?

The Court: Yes.

Mr. Fennelly: Exception.

Q. Did you have a conversation with this man that you knew as Johnson? A. Yes, I talked to him.

Q. November, 1935? A. Yes, sir.

Q. What was that conversation? A. Well, I then

*Assignment of Errors*

1252

went over and asked him if he was being waited on. He said yes. I told him if there was anything he wanted to just ask the clerks and they would be glad to give it to him, in the way of the files.

Q. Did he refer to any specific matter in your court when you were speaking with him? A. He said he had an interest in the claims, the bonds, filed in the General Theatres and that was the talk that he had at that particular time.

Q. When you spoke with him? A. Yes, sir.

1253

Q. Did anyone have to sign any documents to get files? A. No, sir.

The Court: Tell us everything that you recall.

The Witness: He came in and he said he represented a man by the name of Turley, an attorney. I asked him if he was an attorney. We have a rule that only attorneys have access to our records, and my clerk asked him if he was an attorney. I asked the clerk what the gentleman was doing.

The Court: Where was the defendant?

The Witness: At the table, looking in our office.

1254

Q. In the court house? A. He had a file which he was looking at. Knowing that only attorneys had access to those files, I made it my business to know whether he was an attorney.

Mr. Fennelly: I object to what the clerk said to him.

The Court: In his presence.

Mr. Fennelly: No, he was there at the table, as I understood.

Q. You had a conversation with a clerk? A. Yes, sir.

Q. Then you went over to this man? A. Yes.

Q. What was this conversation with this man that you knew as Johnson? A. I asked him if he was being waited on. He said yes. I told him if there was anything he wanted to ask the clerk, and he would be glad to get it. He had represented to the clerk, in my presence he handed the clerk a card with his name on it with 'Turley'. I do not remember where Mr. Turley's office was located, but he was an attorney at law, and they were representing receiverships, if I remember right.

Then he proceeded to go through the file, and I suppose he was in the office—

1256

Q. He went through the files? A. He went through the file and was through.

Q. Was that the only conversation you had there with him? A. Yes.

Q. After that conversation did you see him again in the court house, you personally? A. That was the last trip to the court house. He was in two other days before, November 7. That date I do not think—

Q. How do you place November 7th? A. Through the record that was made by the receiver.

Q. After you had seen him the last time on or about November 7, 1935, you say that you had occasion, through a letter from Mr. Crowder on January 31st to get the bonds he had filed? A. Yes.

1257

Q. You found out there were no bonds there? A. Some of the bonds were there but not all of them.

Q. Had you given permission to anyone to remove the bonds from the claims? A. No, sir.

Q. You are sure of that? A. No, sir."

23. The Court erred in permitting the witness Hines to give the following testimony and the line of testimony following over the objection and exception of the defendant (fols. 825-826).

"Q. Where were you employed in the latter part of 1935? A. I was a clerk in the office of the Registrar in Chancery. That was the office having the records of the Court of Chancery of New Castle County, Delaware.

Q. Wilmington, Delaware? A. Yes.

Q. How long were you a clerk in that court? A. From 1931 up to 1940.

Q. Was there a proceeding in that court known as the General Theatres Equipment case? A. Yes.

Mr. Fennelly: May I have an objection to this line of testimony here, so that I won't have to object again?

The Court: Yes.

Mr. Fennelly: Exception.

Q. Did you see the defendant Chester Bollenbach here at any time? Did you ever see him in your office? A. He came into the office in the Autumn of 1935 and asked to see the records of that General Theatre Equipment case."

24. The Court erred in permitting the Government to introduce in evidence Government's Exhibit 66, being a customer's signature card of Watson & White, signed T. R. Johnson, dated December 16, 1935, over the objection and exception of the defendant (fol. 862).

"Mr. Reis: I offer this card in evidence.

Mr. Fennelly: Same objection, your Honor.

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 66.)"

25. The Court erred in permitting the witness Major to give the following testimony over the objection and exception of the defendant (fol. 863):



"Q. How much were those bonds sold for?

Mr. Fennelly: Objected to as immaterial.

The Court: Overruled.

Mr. Fennelly: Exception.

A. On December 18, 10 bonds were sold for \$1,870.96; on December 19, 10 bonds for \$1,858.45."

26. The Court erred in permitting the Government to introduce in evidence Exhibit 67, being books of account of Watson & White, over the objection and exception of the defendant (fol. 867).

1262

"Mr. Reis: I offer 11 papers from the records of Watson & White pertaining to T. R. Johnson, General Theatre Equipment deal, as one exhibit.

Mr. Fennelly: Same objection.

The Court: Same ruling.

Mr. Fennelly: Exception.

The Clerk: That has been received as Government's Exhibit 67.

Mr. Reis: May I also have pages of the book marked as Exhibit 67, from two books, the ledger and the blotter?

The Court: Same ruling.

Mr. Fennelly: Exception."

1263

27. The Court erred in permitting the Government to introduce in evidence Exhibit 68, being an application to rent space in 1935 at 246 Fifth Avenue in the name of T. R. Johnson, over the objection and exception of the defendant (fols. 884-885).

"Mr. Reis: This paper that I offered before has not been marked.

Mr. Fennelly: Same objection, your Honor. "

1264

*Assignment of Errors*

The Court: Same ruling.

Mr. Fennelly: Exception.

(Marked Government's Exhibit 68.)"

28. The Court erred in permitting the witness Mason to testify to a line of testimony pertaining to transactions of T. R. Johnson of Watson & White in 1935 over the objection and exception of the defendant (fol. 885).

1265 29. The Court erred in permitting the Government to introduce in evidence Government's Exhibits 69 and 70, being statements of the defendant Bollenbach, over the objection and exception of the defendant (fols. 911-915).

"Mr. Reis: I offer both of these in evidence.

Mr. Fennelly: I have no objection, your Honor, in so far as it pertains to the subject matter in this case. I object to it in so far as it pertains to matter outside the case.

The Court: As you read it, if there is any point where you want to make an objection, you may do so. Do you make the general objection?

Mr. Fennelly: Yes.

1266

The Court: I overrule the general objection.

Mr. Fennelly: Exception. I think that specifically covers the objection.

(Two statements marked Government's Exhibits 69 and 70.)

(Mr. Milenky reads Government's Exhibit 69 to the jury.)

(At one point during the reading of the statement the following occurred):

Mr. Fennelly: I take it that you overrule my objection and I have an exception to all of this?

*Assignment of Errors*

126

The Court: Yes."

30. The Court erred in denying the defendant's motion to dismiss the indictment made at the close of the Government's case on the ground that the Government had failed to prove the crime charged to which ruling exception was duly taken (fols. 924-928).

"Mr. Fennelly: I move for a dismissal of the indictment and the direction of a verdict for the defendant on the ground that there is no evidence before the jury from which beyond a reasonable doubt they could find the defendant guilty of the crime charged.

1268

The Court: The motion is denied.

Mr. Fennelly: Exception."

31. The Court erred in denying the defendant's motion to strike out all testimony relating to similar acts and all evidence subsequent to the arrival of the bonds in New York to which ruling exception was duly taken (fol. 929).

"Mr. Fennelly: I would like to move to strike out all testimony of similar acts.

The Court: I think you made your motions during the trial.

1269

Mr. Fennelly: I just wanted to be sure that the record is complete.

The Court: The motion is denied.

Mr. Fennelly: Exception. And also to strike out all evidence as to those transactions subsequent to the arrival of the bonds in New York.

The Court: All right. Motion denied."

32. The Court erred in denying defendant's motions for a dismissal of the indictment and a directed verdict

1270

*Assignment of Errors*

at the close of the entire case, to which ruling exception was duly taken (fol. 984).

“Mr. Fennelly: Could we come back at half past one? I want to renew my motions made at the close of the case, at the close of the government’s case and also move for a directed verdict now.

The Court: The motions will be denied.

Mr. Fennelly: I respectfully except.”

1271

33. The Court erred in charging the jury after the jury announced it was hopelessly deadlocked, and in failing to properly charge the jury as to whether an act of conspiracy can be performed after the crime is committed, and in failing to properly charge the jury at their request as to overt acts to which exception was taken (fols. 1026-1027).

The Foreman: No, sir; it is a hopeless deadlock.

1272

The Court: Any questions of law disturbing you? If there are any questions this is the time to ask them. Is there any question of law disturbing any member of the jury? If so, let me have it now as I am going to give you all night and tomorrow if you want it to consider this case, and I am not going to hurry you at all, so you may as well tell me if there is any question of law disturbing you.

The Foreman: There is not a question of law. I think we are hopelessly deadlocked. It is a question of being divided and we cannot agree.

The Court: If there is any question of law disturbing any juror here, let me know.

The Foreman: No.

The Court: Do you want any further testimony read?

The Foreman: No.

*Assignment of Errors*

1273

A Juror: What about the testimony of Chell Smith from the Minnesota Courthouse? I would like to hear that testimony read.

The Court: I will add this to the charge; perhaps I didn't cover it sufficiently: It is the law that the unexplained possession of stolen property shortly after the theft is sufficient to justify the conclusion by a jury of knowledge by the possessor that the property was stolen. In other words, if you find from the evidence that this defendant was in possession of these—if his possession of the bonds was recent, within a short time, the unexplained possession of those stolen bonds after the theft is sufficient to justify a conclusion by you jurors of knowledge by the defendant that the property was stolen. Now, to possess something you don't have to carry it around in your hand. If it is yours and you exercise dominion over it, it is in your possession. Or, to give an illustration, if one of your number left your watch home today and you are in the courtroom, the watch is in your possession, or if you have left your business in charge of employees, the business is still in your possession. Or if the defendant permitted somebody else to actually handle the bonds, they were in his possession. One who aids and abets another is as guilty as the principal. It is for you to determine upon the evidence and the evidence alone all the facts and circumstances. The Government doesn't have to prove that the defendant actually stole these securities and removed them from Minnesota. Or that he actually took them or that he actually brought them to New York. It is sufficient if he were acting in concert with others and someone did it pursuant to the conspiracy and the

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*Assignment of Errors*

1276

end in view. And you will bear in mind all the rest of the charge. You are to determine the issue of fact here, whether or not upon this evidence the defendant is guilty or innocent.

Is there any question of law?

A Juror: They were using the 1935 trouble in Delaware as proof of his guilt in this.

The Court: That was only received and is only important on the question of intent, the Delaware situation.

1277

And let me say another thing to your gentlemen and lady, that you are to consider this evidence very carefully. You are not to be coerced into a verdict at all of course, but you are to reason it out, and a juror should not have a pride of opinion and stand in the corner and say, 'That is the end of it; I have made up my mind and I won't discuss it.' I want you to go out and deliberate, and I don't want you to be fooled in this case.

A Juror: Can any act of conspiracy be performed after the crime is committed?

1278

The Court: That is one of the crimes alleged, the conspiracy. Conspiracy is one crime alleged and the other is bringing in or causing to be brought in in interstate commerce the stolen bonds. Any other questions?

The Foreman: I think the overt acts ought to be explained to some extent.

The Court: Overt acts may be innocent acts in and of themselves. Let me give you an illustration. If two men agree to burn down this building for example. They just say 'We are going to burn it down.' And they commit no overt act. Then there is no crime. Just by talking about it there is no

*Assignment of Errors*

1279

crime. Now if as a part of that conspiracy it is the duty of A to cross the street twice as a signal—ordinarily crossing the street twice is not a crime in and of itself. But if crossing the street is the signal to the man on the other side to burn the building, that is an overt act. An overt act may be innocent, like crossing the street, or it might be the firing of a gun. There would be the crime of firing the gun and the crime of conspiracy, and the overt act in that picture would be a guilty act as well as the overt act itself. Does that explain it? Are there any other questions?

1280

I think in this case there ought not to be any difficulty in coming to a proper verdict. The lawyers have a duty to perform and the Court has performed its duty and now you perform yours. I am going to give you such time as you need. You have in mind all the charge that I have given you and what I have given you since you came in.

Are there any other questions? I am going to wait here until half-past ten. You don't have to agree by half-past ten, but if you haven't agreed by that time I will send you to a hotel tonight. That doesn't mean you have to agree at 10:30. You can take as much time as you want, tonight, tomorrow and tomorrow night if you need it.

1281

Are there any other questions?

All right, you may retire.

(At 10:10 P. M. the jury left the courtroom.)

(At 10:30 P. M. the jury returned into the courtroom.)

Mr. Fennelly: Your Honor had left the bench so quickly—

1282

*Assignment of Errors*

“The Court: I thought I gave you plenty of time. You may take your exceptions on the record.”

1283

Mr. Fennelly: I except and I would like it to appear that at about 10:15 P. M. the jury returned and reported to your Honor that they were in a hopeless deadlock. That your Honor then proceeded to read to them some law pertaining to an inference to be drawn about the unexplained possession of bonds by a defendant. I except to that charge as—while it may be the law it has no application to this case because any connection this defendant had with the bonds in New York is fully explained.”

(Fol. 1039) “Mr. Fennelly: I further except to your Honor’s failure to instruct in response to one of the jurors. I understood the question was whether or not a conspiracy could be committed where the object of the conspiracy had already been completed.”

1284

34. The Court erred in failing to properly charge the jury on the subject of conspiracy at their request, and improperly charging them on the presumption raised by an unexplained possession of stolen property, to which ruling an exception was duly taken (fols. 1041-1043).

“I have this note from the jury: ‘If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count.’

Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of

*Assignment of Errors*

1285

stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case.

Mr. Fennelly: I except to your Honor's charge. And I ask—

The Court: I won't take any requests. You may except to the charge, but I will not take any requests.

1286

Are there any other questions?

Mr. Fennelly: Exception."

85. The Court erred in denying the defendant's motion to set aside the verdict and for a new trial as against the evidence to which ruling an exception was taken (fols. 1044-1045).

Mr. Fennelly: I move to set aside the verdict and for a new trial as against the evidence and the weight of the evidence.

The Court: Motion denied.

Mr. Fennelly: An exception."

1287

WHEREFORE, the defendant, Chester G. Bollenbach, for the errors aforesaid, prays that said judgment of conviction be reversed.

Dated, April 1, 1943.

Yours, etc.,

WELLMAN, SMYTH, LOWENSTEIN & FENNELLY,  
Attorneys for Defendant Chester G. Bollenbach,  
Office and Post Office Address,  
25 Broad Street,  
City of New York.

1288

**Order Extending Time to File Bill of Exceptions  
and Assignment of Errors**

**UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

[SAME TITLE]

Comes now Cliester G. Bollenbach, the defendant-appellant, by his attorney, Leo C. Fennelly, and upon his application, it is

1289

ORDERED, that the defendant-appellant have until the 1st day of September, 1943, within which to file an assignment of errors upon which he relies in making his appeal and within which to prepare and to procure to be settled and to file a bill of exceptions and record setting forth the proceedings upon which the said defendant-appellant wishes to rely in the prosecution of his appeal.

Dated: New York, April 22, 1943.

1290

JEROME N. FRANK,  
United States Circuit Judge.

Consented to:

ROBERT ROY DANN,

Assistant United States Attorney.



**Stipulation as to Record****UNITED STATES DISTRICT COURT****FOR THE SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record in the said District Court, in the above entitled matter as agreed on by the parties, and that the foregoing record be submitted to the District Judge sitting in Criminal Term to be ordered on file as the bill of exceptions and transcript of the record herein in the above entitled matter.

1292

Dated: New York, , 1943.

WELLMAN, SMYTH, LOWENSTEIN & FENNELLY,  
Attorneys for Defendant-Appellant,  
Chester G. Bollenbach.

MATHIAS F. CORREA,  
United States Attorney for the Southern  
District of New York, for the Appellee,  
United States of America.

1293

**Order Settling Bill of Exceptions**

Upon the foregoing stipulation, the Bill of Exceptions is hereby settled and allowed and ordered to be filed and made a part of the transcript of the record herein.

Dated: New York, , 1943.

.....  
U. S. D. J.

1294

## Clerk's Certificate

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

1295

I, GEORGE J. H. FOLLMER, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the said Circuit Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this            day of           , in the year of our Lord one thousand nine hundred and forty-three, and of the independence of the said United States the one hundred and sixty-fifth.

GEORGE J. H. FOLLMER,  
Clerk.

(SEAL)

1296

## Opinion (C. C. A.)

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 40—October Term, 1944.

(Argued October 9, 1944

Decided December 5, 1944.)

UNITED STATES,

*Appellee;*

*v.*

CHESTER G. BOLLENBACH,

*Appellant.*

1298

Before:

L. HAND, AUGUSTUS N. HAND and CHASE,

*Circuit Judges.*

1299

Appeal from a judgment of conviction of the District Court for the Southern District of New York, upon an indictment for conspiracy to transport in interstate commerce, securities of the value of \$5,000, knowing them to have been stolen: §§ 415 and 88, Title 18, U. S. C.

LEO C. FENNELLY, for the appellant.

HAROLD J. McAULEY, for the appellee.

1300

*Opinion (C. C. A.)*L. HAND, *Circuit Judge*:

1301

Bollenbach was indicted upon two counts: for transporting "securities of the value of \$5,000" in interstate commerce, knowing them to have been stolen, and for a conspiracy to commit that offense. The jury acquitted him upon the first count, and convicted him upon the second. The errors of which he complains are as follows: (1.) that the stolen property was not shown to have been worth \$5000; (2.) that the judge's instructions were erroneous; (3.) that evidence was admitted against him of other crimes of the same kind; (4.) that the evidence did not support the verdict—especially because the transportation had ended before Bollenbach became connected with it—; and (5.) that incompetent testimony was admitted against him.

1302

The stolen securities were negotiable notes of a corporation in reorganization in the United States District Court for the District of Minnesota; they had been fastened to "proofs of claim" which had been "allowed" by the court, and were on file with its clerk. Some one detached the notes from the "proofs of claim," stole them from the clerk's office, brought them to New York, and sold them for more than \$5000. The argument is that, since a claim in bankruptcy, or in reorganization, becomes a judgment, when it has been "allowed" (*United States v. American Surety Co.*, 56 Fed. (2) 734, 736 (C. C. A. 2); *Dewith v. Irving Trust Co.*, 67 Fed. (2) 855 (C. C. A. 2)), the notes were merged in the claims, and were valueless when detached. Besides stolen "securities," presumably valid, the statute covers "falsely made, forged, altered or counterfeited securities," and it can scarcely have been the purpose of Congress to exclude a security, originally valid, but later merged in a claim, and yet to include securities void from their inception. A lower limit was set for valid securities to exclude petty thefts; there was none in the case of false

securities; and if, as the accused argues, the notes here in question had really been merged, they more nearly approached altered securities than valid ones. They had an actual value of \$5000, as the record shows, even though it was factitious, and would not have survived a full disclosure of the facts.

The second alleged error we shall come back to later; the third consists of the admission of evidence that the accused had been concerned in earlier crimes of the same sort. We are not clear whether the objection is that the evidence was not competent at all, or whether it should not have been admitted after it appeared that the accused had confessed in writing the commission of the earlier crimes. That the commission of earlier crimes of the same kind is always competent on the issue of intent, is too well settled to justify the citation of authorities; and it is difficult to see what prejudice the accused could have suffered by calling witnesses to confirm his own written confession. Even if he did, there was no reason not to make assurance doubly sure by supplementing his confession by testimony, for juries often regard confessions with suspicion. 1304

The fourth error is of the insufficiency of the evidence and depends principally upon the supposed incredibility of the testimony of one, Chell Smith, who identified the accused as having been in the clerk's office in Minnesota before the theft. Had we been on the jury, we should indeed have laid little weight upon the identification, but clearly its credibility was for the jury and we may not intervene. The fact that the overt acts were all laid at a time after the transportation of the notes had ended in New York presupposes that the accused could not be convicted of a conspiracy which he only joined thereafter. It is more conveniently dealt with in connection with the second point to which we now come: *i. e.* the judge's charge. 1305



1306

*Opinion (C. C. A.)*

1307

The colloquial charge was unexceptionable; and indeed the accused did not except to it. However, after the jury had been out seven hours and were, in the foreman's words, "hopelessly deadlocked," they came into court to report their disagreement, and during the interchange that followed one of them asked whether "any act of conspiracy" could be "performed after the crime had been committed." The judge failed to answer this question directly, and again the accused did not except. The jury went out a second time, but soon came back; and the accused's attorney then excepted to the judge's earlier failure to answer the question, to which the judge mistakenly replied that he had already told them that there could be no conspiracy after the object of the conspiracy had been attained. He then proceeded to read a note from the jury, asking whether the accused could be guilty of conspiracy if he knew the bonds were stolen when he helped to dispose of them. To this the judge answered: "Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. \* \* \* I further charge you that possession of stolen property in another state than that in which it was stolen shortly after the theft, raises a presumption that the possessor was a thief, and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case." To this the accused excepted; the jury went out and came in ten minutes later with a verdict on the count for conspiracy.

1308

The meaning of the first sentence, just quoted, is clear: *i. e.*, although the accused would not be guilty of conspiracy if he only learned that the notes were stolen after he had

disposed of them, he would be guilty, if he learned so before. That implied that he could be guilty of a conspiracy to transport stolen notes, if he joined in their disposal after the transportation had ended. Strictly speaking, that was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York. However, to help dispose of them was to become an accessory after the fact; and that was also a crime (§ 551, Title 18, U. S. C.). It was therefore also a crime to join a conspiracy to dispose of them; and for that crime the conspirators joining after the transportation was over might be indicted as principals. *Skelly v. United States*, 76 Fed. (2) 483 (C. C. A. 10). (Incidentally, this disposes of the objection that the overt acts were all laid after the notes had come to New York).

1310

So far the judge's charge was therefore right; but we think it was wrong to tell the jury that the possession of the notes raised a presumption that the accused was the thief and had transported them in interstate commerce, although, it is only fair to add that the mistake was ours, not his, for, as will appear, he borrowed the instruction directly from us. We shall assume, arguendo, as we did in *United States v. Crimmins*, 123 Fed. (2) 271, that it may not be necessary in a prosecution for the substantive crime to prove that an accused, who knows that the securities have been stolen, also knows that they are being moved in interstate commerce. Indeed, we have so decided in the case of receivers of stolen property. *Rosen v. United States*, 271 Fed. Rep. 651. But there can be no doubt that such knowledge is necessary to a conviction for conspiring to transport, since no agreement can go beyond the terms of the confederates' mutual understanding. That possession of stolen goods shortly after the theft, raises a presumption

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*Opinion (C. C. A.)*

of knowledge that they had been stolen is indeed well-settled law; but in *Drew v. United States*, 27 Fed. (2) 715, 716, from which the judge quoted in his charge, we went much further, for, in an appeal from a conviction for the substantive offence, we declared that recent possession "raised a presumption that he" (the accused) "was the thief, and had transported it" (the stolen car) "to New York." The decision has been often cited, but never for more than the presumption of guilty knowledge.

1313

It was quite unnecessary in *Drew v. United States*, *supra*, to say anything more; other evidence in the record proved that the stolen car had been transported from New Jersey; patently it had been brought from that state. That was enough, for the accused, once knowledge was brought home to him that the goods were stolen, was guilty either as the thief, or, as we have shown, as accessory after the fact under § 551 of Title 18, U. S. C. Certainly it is untenable to say that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce. Possibly, when they have in fact been so transported, it is a little less unreasonable to say that possession raises a presumption that their possessor knew

1314

that they have been transported; but we did not say that, and if we had, it would have been totally without support in the books, and, as *res integra*, it could not be defended, at least in the case of negotiable securities like those at bar. It is of course possible that, a man, dealing in stolen securities, and knowing or suspecting that they have in fact been stolen, may inquire where the seller got them; but it is more likely that he will not wish to do so. Inquiry is apt to add to that information, any evidence of which he will at all hazards wish to suppress; it will be safer to take the securities as they are presented, than to meddle into their source. The dictum in *Drew v. United States*, *supra* (27 Fed. (2) 715), was an inadvertence, and it is overruled.

*Opinion (C. C. A.)*

1315

Nor can we say that the error was negligible. The only evidence that the accused knew where the notes had come from, was the testimony of Chell Smith, which, as we have already said, was not convincing, and which there is every probability that the jury did not believe, for, if they had, they would scarcely have brought in a verdict of acquittal on the first count. Upon this constituent element of the conspiracy—knowledge of the place of the theft—there is therefore good reason to assume that they relied upon the presumption, and that it was the keystone of the arch.

Judgment reversed; new trial ordered.

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Petition for Rehearing by United States Attorney

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[COVER]

**United States Circuit Court of Appeals**

FOR THE SECOND CIRCUIT

No. 40, 1944

1319

UNITED STATES OF AMERICA,

*Appellee,*

*v.*

CHESTER G. BOLLENBACH,

*Defendant-Appellant.*

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**PETITION FOR REHEARING**

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1320

JOHN F. X. MCGOHEY,  
*United States Attorney for the  
 Southern District of New York,  
 Attorney for the Appellee.*

HAROLD J. MCAULEY,  
*Assistant United States Attorney,  
 Of Counsel.*

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*Petition for Rehearing by United States Attorney.* 1321

# United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

No. 40

Term, 1944

UNITED STATES OF AMERICA,

*Appellee,*

v.

CHESTER G. BOLLENBACH,

*Defendant-Appellant.*

1322

## PETITION FOR REHEARING

Now comes plaintiff-appellee and, believing the court to have erred in a material respect in its opinion and that a correction of such error would lead to a different conclusion, respectfully requests a rehearing of this cause. 1323

The ground for this petition is as follows:

I. The Court erred in concluding (last paragraph of the Opinion) that on the constituent element of the conspiracy—the defendant's knowledge of the place of the theft—the only proof in the case was the testimony of Chell Smith. There was other cogent proof on this point—the admissions of the defendant himself—that he knew the

1324 *Petition for Rehearing by United States Attorney*

bonds had been stolen and had moved in interstate commerce. The defendant's knowledge on this point was *conceded by him* in his brief, and these facts, namely, the admissions and the concession of the admissions are clearly inconsonant with the precise wording and sense of the Opinion.

## I

1325

The Government was undoubtedly remiss in not stressing other important evidence in the record on the question of the defendant's knowledge of the place of the theft, so that it would come plainly to the attention of the court; because there is such other important evidence on this point which it would appear escaped the attention of the court, otherwise the court would scarcely have concluded with the following:

1326

"Nor can we say that the error was negligible. The only evidence that the accused knew where the notes had come from, was the testimony of Chell Smith, which, as we have already said, was not convincing, and which there is every probability that the jury did not believe, for, if they had, they would scarcely have brought in a verdict of acquittal on the first count. Upon this constituent element of the conspiracy—knowledge of the place of the theft—there is therefore good reason to assume that they relied upon the presumption, and that it was the keystone of the arch."

The above paragraph appears to be summary in nature and to set forth very clearly the *rationale* for the reversal of the judgment. In fact, the last sentence states so very pointedly.

The record reveals that the defendant himself admitted his knowledge of the place of the theft and that he had such knowledge prior to the disposal of the bonds; moreover, in defendant's brief he concedes such knowledge. (Page 8, Point III, second sentence; page 15, second sentence with a reference to Exhibit 70 at ff. 1178-1181.)

This concession is in the very language which the court covered in its discussion of the point and is set forth below:

"The defendant admitted in his statement Exhibit 70, that after the gold notes were in New York, he aided Burns in selling fifteen of them, and at the time he knew that they had been stolen and that Burns had obtained them in the West."

1328

On this same point the record is as follows at ff. 1124, 1125:

"Q. Did you ask him where he obtained these bonds? A. He told me he obtained them out west."

Again at ff. 1177, 1178, 1179:

"Q. Now, will you tell us again how you happened to enter into that transaction? A. Sometime in the month of January 1937, Burns advised me that he had 15,000 Minnesota, Ontario Paper Company bonds and wanted to dispose of them."

1329

Q. Did he indicate to you where he had obtained these bonds? A. Offhanded, and from my best recollection, he did not but I knew that he had been in Chicago so I assumed that he got them there.

Q. Did he indicate to you whether or not the bonds were stolen? A. He did not.

Q. Did you know that they were stolen? A. I didn't know they were stolen until later.

Q. But he did tell you later that the bonds had been stolen; is that correct? A. Yes.

Q. When did he tell you that? A. I believe after the bonds had been sold or during the consummation of the selling of the bonds."

1330 *Petition for Rehearing by United States Attorney*

Also in the record at ff. 1180 and 1181:

"Q. What did you tell him? (Turley). A. Either Burns or I told him that there was some bonds that had to be disposed of.

Q. Did you tell him what kind of bonds? A. I presume we did.

Q. Did you tell him that they were stolen bonds? A. *No question in my mind that he knew the origin of the bonds.*

Q. How do you know that? A. Because I think *we explained* or Burns explained, *how we got these bonds.*

1331

Q. What is your best recollection as to Burns' explanation as to how he got these bonds? A. That he brought them in from the west.

Q. *That he stole them?* A. *I wouldn't exactly use those words but from what I can gather, that would rather definitely express it."*

The above clearly shows that the court was in error in stating that "The only evidence that the accused knew where the notes had come from was the testimony of Chell Smith."

1332

Moreover the jury could have believed the testimony of the witness Jacobson (ff. 463, 472, 479, 498, 501-545, 717-720) and concluded that the knowledge of the place of the theft which the defendant himself admitted he had concerning 15 of the bonds, was also had by him with reference to the first group of 10 bonds, where the sale was not consummated.

If then, the court based its opinion mistakenly upon the belief that Chell Smith's testimony was the only evidence in the case (save the charge on the presumption) does not each conclusion drawn from that erroneous premise as stated in the final paragraph of the opinion, fall?

If so, the following questions may well be raised:

1. Assuming the jury did not believe Smith, might they not at the same time as well have strongly believed the defendant's own confession that he had knowledge of the place of the theft of the bonds and therefore based their acquittal on the first count and the conviction on the conspiracy on these two beliefs?

2. If the jury had relied to the extent the court indicates on the presumption "That the accused was the thief and had transported them in interstate commerce" would not the jury have returned a guilty verdict on the first count as that count so clearly squares with the language of the presumption charged? Is not the conspiracy count more remote from the presumption?

1334

3. Was not the error negligible?

It would appear, if acknowledgment is given to the record cited above, that each of the above questions might be answered in the affirmative.

The Court itself stated on page 235 of the Opinion:

"But there can be no doubt that such knowledge is necessary to a conviction for conspiring to transport, since no agreement can go beyond the terms of the confederates mutual understanding."

1335

The knowledge the Court was referring to was knowledge of the movement of stolen securities in interstate commerce. There then, was the law necessary to support a conviction on the second count of this indictment. And to fit that law, there was the defendant's own admission in the record, and conceded by him in his brief, that he knew the bonds had been stolen and had come in to New York from the West, probably Chicago. To a certainty, the proof was sufficient to support the conviction and had the Government made the record clear in its brief the Court would



1336

*Petition for Rehearing by United States Attorney*

not have been misled, as the final paragraph of the Opinion so explicitly reveals it was misled.

The Opinion made clear that it was a crime under the indictment to join a conspiracy to dispose of the bonds with knowledge that they had been stolen and had moved in interstate commerce, *Skelly v. United States*, 76 Fed. (2nd) 483 (C. C. A. 10th), so that point will not be discussed in this petition.

1337

Further, in view of the record cited above, it is respectfully called to the Court's attention that it was in error, and unwarrantedly favored the defendant on page 236 of the Opinion, where it discusses the probabilities in the relationship of thieves and concludes, in effect, that Bollenbach, as a cautious thief, would gingerly avoid inquiring of Burns, the origin and source of the stolen bonds. The record, as now called to the Court's attention, states from the very lips of Bollenbach himself that he did not suppress his knowledge of the origin of the stolen bonds and that he did "meddle into their source". This line of reasoning by the Court would in all probability not have been indulged in, but for the omission of the Government to emphasize one of the most impressive parts of the record.

1338

JOHN F. X. McGOHEY,  
*United States Attorney,*  
*Attorney for Petitioner.*

HAROLD J. McAULEY,  
*Assistant United States Attorney,*  
*Of Counsel.*

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### Certificate

I certify that this Petition for Rehearing, in my opinion, is well founded in fact and law and that it is not filed for the purpose of delay.

HAROLD J. McAULEY

**Reply to Petition for Rehearing**

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{COVER}

**United States Circuit Court of Appeals**FOR THE SECOND CIRCUIT

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No. 40, 1944

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1340

UNITED STATES OF AMERICA,

*Appellee,*

vs.

CHESTER G. BOLLENBACH,

*Defendant-Appellant.*

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**REPLY TO PETITION FOR REHEARING**

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1341

C.

1342

*Reply to Petition for Rehearing***United States Circuit Court of Appeals**

FOR THE SECOND CIRCUIT

No. 40, 1944

UNITED STATES OF AMERICA,

*Appellee,*

1343

*vs.*

CHESTER G. BOLLENBACH,

*Defendant-Appellant.***REPLY TO PETITION FOR REHEARING**

The Government does not question that the charge was erroneous but points out that the Court in the last paragraph of its opinion assigned an incorrect reason as to why the error was not negligible:

1344

That the error in the charge was not negligible seems patent as in effect the Court took away from the jury every issue of fact. The Court told the jury they could presume that Bollenbach was the thief and that he had transported the bonds in interstate commerce.

The only proof as to either of the above items was the testimony of Chell Smith whom the jury obviously did not believe.

While we cannot speculate as to how the jury arrived at the verdict, it would seem that despite their disbelief

*Reply to Petition for Rehearing*

1345

this charge resulted in a verdict ten minutes after it had been given, although previous to that time they had been deadlocked for seven hours.

In answer to the jurors' question, the jury should have been instructed that mere knowledge that the bonds were stolen was not sufficient to convict Bollenbach of a conspiracy. They had to determine whether or not the conspiracy was in existence at the time of his acts and that what he did was in furtherance of the conspiracy. *U. S. v. Zeuli*, 137 Fed. (2d) 847 (CCA 2nd, 1943).

1346

The charge would still be erroneous if the defendant had been tried as an accessory but that was not the Government's theory of the case, nor was he sentenced as such. Otherwise his sentence is illegal. TITLE 18, Section 551.

Respectfully submitted,

FENNELLY, LOWENSTEIN, ENGELHARD & PITCHER,  
*Attorneys for Defendant-Appellant.*

LEO C. FENNELLY,  
*Of Counsel.*

1347

1348

## Decision on Petition for Rehearing

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES,

*Appellee,*

v.

CHESTER G. BOLLENBACH,

*Appellant.*

1349

Before:

L. HAND, AUGUSTUS N. HAND and CHASE,  
*Circuit Judges.*

## ON REHEARING.

The last paragraph of the opinion will be changed to read as follows.

1350

"We were at first under the mistaken impression that we could not properly disregard this error because the only evidence as to whether the accused knew that the bonds had come from another state was the testimony of Chell Smith. The prosecution calls our attention to the fact that this is not true, because upon an examination before two agents of the Federal Bureau of Investigation after his arrest, the accused stated that he knew that the bonds had come from the West." This statement, taken on September 8th, 1938, he signed on the 21st, on the advice of his counsel who was present at the time, and his brief on this appeal conceded that he knew that Burns had obtained the bonds in the west. In the face of that statement and that concession it would be altogether unwarranted to reverse the judgment because of the mistake in the charge which we have discussed.

"Judgment affirmed."

Filed January 12, 1945.



Petition for Rehearing by Counsel for Appellant

1351

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[COVER]

**United States Circuit Court of Appeals**

FOR THE SECOND CIRCUIT

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No. 40, 1944

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1352

UNITED STATES OF AMERICA,

*against*

*Appellee,*

CHESTER G. BOLLENBACH,

*Defendant-Appellant.*

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**PETITION FOR REHEARING**

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1353

HENRY G. SINGER,

*Attorney for Petitioner-Appellant,*

16 Court Street,

Brooklyn, N. Y.

HARRY SILVER,

*With him on the Petition.*

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1354

*Petition for Rehearing by Counsel for Appellant***United States Circuit Court of Appeals**

FOR THE SECOND CIRCUIT

No. 40

Term, 1944

1355

UNITED STATES OF AMERICA,

*Appellee,**against*

CHESTER G. BOLLENBACH,

*Defendant-Appellant.***PETITION FOR REHEARING**

1356

Now comes appellant and, believing the Court to have erred in a material respect in its opinion on rehearing as well as in material respects in the original opinion and that a correction of such errors would lead to a different conclusion, respectfully requests a rehearing of this cause.

On December 5, 1944, appellant's conviction on the conspiracy count was reversed. On January 12, 1945, this Court, on application of the United States Attorney, granted rehearing, reversed itself, and affirmed.

Under Rule 27, the Court is respectfully requested to permit oral argument upon this application.

The grounds for this petition are as follows:

*Petition for Rehearing by Counsel for Appellant*

1357

1. The Court erred in concluding that the conspiracy count in the indictment included an agreement to dispose of the bonds.

2. The Court erred in concluding that appellant, in attempting to dispose of the bonds after they came to rest in this District, was an accessory after the fact under Title 18, Section 551.

3. The Court erred in concluding that the error upon which its first opinion of reversal was based became negligible because of the appellant's statements, Exhibits 69 and 70, and his concessions in the main brief.

1358

4. The Court erred in concluding that the sentence of two years imprisonment and the fine of \$10,000 was valid.

5. The Court erred in concluding that the bonds possessed jurisdictional value under Title 18, Section 415, and overlooked the fact that this Section of the law had been amended after the alleged offense had been committed.

## 1

The Court, in its original opinion (December 5, 1944) states:

1359

"The meaning of the first sentence, just quoted, is clear: *i. e.*, although the accused would not be guilty of conspiracy if he only learned that the notes were stolen after he had disposed of them, he would be guilty, if he learned so before. That implied that he could be guilty of a conspiracy to transport stolen notes, if he joined in their disposal after the transportation had ended. Strictly speaking, that was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it ended when the notes came to rest in New York."

1360 *Petition for Rehearing by Counsel for Appellant* o

The conspiracy count charged an agreement to violate Title 18 U. S. C., Section 415. The second paragraph avers that it was part of that conspiracy or agreement that the defendants "would transport and cause to be transported in interstate commerce" certain bonds to this district "knowing the same to have been so stolen".

1361 It is elemental that the agreement or confederation is the gist of the crime of conspiracy (*Fowler v. U. S.*, 273 F. 15, 19; *Pettibone v. U. S.*, 148 U. S. 197, 203; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443).

1362 Proof of acts not within the scope of the allegations of the indictment cannot enlarge the agreement charged. Here the agreement was to transport the stolen bonds to New York, and not a single allegation was made to the effect that it was part of the conspiracy to dispose of the stolen bonds. The overt acts which alleged matters that occurred after the bonds had come to rest in the State of New York cannot aid the "charging" part of the conspiracy count, which in itself must sufficiently state the offense (*U. S. v. Britton*, 108 U. S. 199; *Pierce v. U. S.*, 252 U. S. 239). As a matter of fact not even the overt acts allege the disposition of the stolen bonds.

So it appears that the theory on which the Court sustained this conviction is not within the scope of the conspiracy count and is not within the crime for which this defendant was indicted.

### Authority Overlooked

In *Gable v. U. S.*, 84 F. 2nd 929, cited with approval by this Court in *U. S. v. Crimmins*, 123 F. 2nd 271 the Seventh Circuit said, in a case identical with ours:

*Petition for Rehearing by Counsel for Appellant*

1363

"The only proof is that after the bonds had been stolen and transported and delivered to him, he agreed for a commission, to dispose of the same. This is not proof of the conspiracy charged."

In the *Gable* case there, likewise was no proof of a conspiracy on the part of the appellant to transport the property in interstate commerce. In both cases the record was "devoid of any evidence" that appellant had entered into any conspiracy which had for its purpose the stealing of the bonds or the transportation of them or their delivery after transportation. This Court, in the *Crimmins* case, *supra*, said that they were entirely in accord with the *Gable* case. In its original opinion the Court apparently overlooked the effect of its decision in the *Crimmins* case and has now decided the situation directly contrary to the holding in the *Gable* and *Crimmins* cases, and there is by reason thereof a complete variance between the two circuits.

1364

## 2

This Court, in its original opinion, states:

"However, to help dispose of them was to become an accessory after the fact, and that was also a crime (Sec. 551, Title 18, U. S. C.). It was therefore also a crime to join a conspiracy to dispose of them; and for that crime the conspirators joining after the transportation was over might be indicted as principals. *Skelly v. United States*, 76 Fed. (2) 483 (C. C. A. 10). (Incidentally, this disposes of the objection that the overt acts were all laid after the notes had come to New York)."

1365

But the *Skelly* case, above cited, has no application for the indictment in the *Skelly* case charged, as a part of the illegal agreement, the transportation of the ransom money



1366

*Petition for Rehearing by Counsel for Appellant*

across state lines and the changing of the money and securities into different form, so as to "avoid detection, apprehension and arrest". There is no such allegation here.

In the *Skelly* case, the indictment further charged a comprehensive conspiracy to transport a kidnapped person, and generally to cross state lines with the ransom money. The indictment was very specific in its charging part concerning the means to be used in effectuating the agreement to transport the ransom money.

1367

It was error for this Court to hold that appellant was an accessory after the fact, when he helped to dispose of the bonds. The disposition of the bonds was not a Federal offense (*Gable v. U. S.*, *supra*). There is no reported authority that a person may become an accessory after the fact to a conspiracy. As we have said, a conspiracy is an agreement to commit an offense to which all persons who join become criminally liable. An accessory after the fact is one who receives, comforts or assists a felon. It must be as to the *person* not the loot. In any event there is a distinction between an aider and abettor under Title 18, Section 550, and an accessory after the fact, under Title 18, Section 551. Aiders and abettors may be indicted as principals. Accessories after the fact must be indicted as such.

1368

"Indictment must be specific. An accessory after the fact cannot be convicted on an indictment charging him as principal" (Wharton's Criminal Law, Section 285).

"The accessory after the fact is left by the statutes generally as at common law; he must be indicted as such and cannot be treated as a principal" (42 Corpus Juris Secundum, 1078, Section 149).

It is true that the principal and the accessory after the fact may be joined in a single count, but the count must

*Petition for Rehearing by Counsel for Appellant*

1369

nevertheless show distinctly which is the principal and which is the accessory after the fact. In this connection, the Court's attention is called to the lengthy footnote on page 488 of 76 F. 2nd in connection with the *Skelly* opinion.

Even if there were such a hybrid as an accessory after the fact to a conspiracy, the *Gable* case distinctly holds that the receiver or seller of stolen bonds (which is what this Court has stated appellant actually was) is not guilty of any offense under Federal Law unless the property which he receives has been stolen while moving in or constituting a part of interstate commerce. In the *Gable* case the bonds were stolen in Missouri and transported to Chicago, and then delivered to Gable who disposed of them. In the instant case the bonds were stolen in Minneapolis and transported to New York, delivered to appellant who helped dispose of them. In the *Gable* case the Court held that under the conspiracy count and the substantive offenses, no Federal crime was proven, and that should be the ruling here, especially since, as we have said before, this Court has in the *Crimmins* case specifically approved the doctrine of the *Gable* decision.

1370

It is well settled at common law that a receiver of stolen goods is not an accessory after the fact (1 *Bishop Criminal Law* 692, 695, 699; *Wharton's Criminal Law*, Volume 1, p. 370—Footnote).

1371

3

During their deliberations, the jury returned and asked the following question:

"Can an act of conspiracy be performed after the crime is committed" (p. 344).

1372      *Petition for Rehearing by Counsel for Appellant*

The Court did not answer this question.

Later on, the jury returned again. At this time a note was given to the judge as follows:

"If the defendant were aware that the bonds which he aided in disposing of were stolen, does that knowledge make him guilty on the second count" (p. 347).

1373      The Court answered this question by stating that "If it had occurred afterwards, it would *not* make him guilty" and then proceeded to set forth the presumption which formed the basis of this court's reversal. Upon a showing that appellant had made certain admissions the opinion on rehearing affirmed the conviction.

1374      This court erred because it overlooked the fact that it was the trial judge's charge on this subject which brought about the conviction. The question of the defendant's admissions had already been covered and discussed (p. 346). The jury was now confronted with the basic question of law in the case—Can a man be guilty of a conspiracy if he joins it after its purpose had been accomplished? They were told by the trial judge that there was proof in the case from the *presumption* that the appellant had joined the conspiracy before it was completed (pp. 347-8).

In other words, when the court told the jury that "possession of stolen property in another state than that in which it was stolen shortly after the theft, raises a presumption that the possessor was the thief and transported stolen property in interstate commerce," it in effect told the jury that such presumption was sufficient to make the appellant a party to the alleged enterprise of bringing the stolen bonds from Minneapolis to New York.

*Petition for Rehearing by Counsel for Appellant*

1375

This court has reversed itself upon the theory that the defendant had admitted before the trial that he knew the bonds were procured somewhere in the west and that sometime during the course of disposing of them he may have learned that they were stolen. It introduces the theory of guilt as an accessory after the fact. However, that was not what the jury understood it to be. The jury were told in no uncertain terms that the presumption was proof that the appellant was a party to the transportation of the stolen bonds from one state to the other. Nothing about accessory after the fact was mentioned by the trial judge;

1376

Therefore it is error for this court to take the position that because the defendant had made concessions concerning the origin of the bonds and his knowledge thereof, that such concessions removed the original error committed by the trial court and upon which the original reversal of the judgment of conviction was based.

There is no doubt that the trial jury were convinced that the appellant did not become connected with these bonds in any way until after they had come to rest in the State of New York. It was this charge on presumption which cemented the contrary unproven and untrue idea in their minds.

1377

It was the duty of the trial judge to tell the jury without qualification or modification that if they believed from the facts in the case that appellant joined this conspiracy after the bonds came to rest in New York and after the crime of transportation had been completed, that appellant could not be convicted of a conspiracy to transport them. After all is said, that is the only charge made in this indictment.

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*Petition for Rehearing by Counsel for Appellant*

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1379

Assuming *arguendo*, that the theory of the accessory after the fact of a conspiracy could possibly be sustained, the court erred in permitting the sentence of two years imprisonment and \$10,000. fine to stand. The clear provisions of Title 18, § 551 are that where a person is an accessory after the fact, the punishment is limited to one-half of the punishment set forth for the original crime itself. Conspiracy under Title 18, § 88, is punishable by two years and \$10,000. fine. If the appellant, by any extension of legal theories, is declared to be an accessory to the crime of conspiracy after the fact of conspiracy, then his punishment should have been limited to one year imprisonment and \$5,000. fine. To take one position and not the other is entirely inconsistent.

5

1380

The Government, in support of its contention that the notes did possess the requisite value, states in its main brief at page 11:

"It should also be noted that in Section 417 of Title 18, the United States Code, it is stated, 'that the value of any securities referred to shall be considered to be the face, par or market value, whichever is the greatest.' It is conceded in this case that the face value of the bonds was \$25,000."

Aside from the fact that the above quoted text of the law does not refute the objection that the notes had merged in the allowed claim, it is to be noted that the quoted matter from Section 417 did not appear in the law at the time the offense herein is laid in the indictment. The text as quoted



*Petition for Rehearing by Counsel for Appellant*

1381

in the above extract from the Government's brief appears for the first time in the amendment of the National Stolen Property Act, Section 5 at 53 Stat. 1178. Compare the original Act, 48 Stat. 794.

The question as to whether, under the original text of the law, the jurisdictional value of \$5,000. was possessed by the stolen bonds, is one which by close analogy has been the subject of a long line of adjudications in the law of larceny and grand larceny. At common law, stealing of a check or note did not constitute the crime of larceny. Under the statutes, it has been the general rule that to constitute larceny of a written instrument the paper must be effective and operative when taken. (See *People v. Stevens*, 38 Hun 62, 64.)

1382

In *People v. Loomis and Ramsdell*, 4 Denio (N. Y.) 380, 382, the Court states:

"It is well settled that to bring a case within the purview of the latter statute, the written instrument taken by theft or robbery, must not only have been made and executed in due form and manner, but must also have remained unsatisfied and in full force, so that, when taken, it was an effective and valuable security. The instrument, although complete in form and signature, and ready to be issued or delivered according to its design, could not while in that state, be subject of robbery or larceny. Nor could such an offense be committed in regard to a security, originally valid but which had since been fully paid and satisfied, for it was no longer available for its original purpose, or of value to anyone.

1383

It was not a felony under this statute to steal bankers' notes which had been completely executed but not issued, for no money was then due on them. (Citations):

1384

*Petition for Rehearing by Counsel for Appellant*

A check signed but not delivered while it remains in the hands of the drawer rests on the same principle and is not a subject of larceny. (Citations)

The stealing of bankers' notes which have been issued and paid although there was right to re-issue them, was held not to be within this Act. (Citations)"

1385

Indeed, the only dissent from the propositions set forth in the quotation from the last cited case, appears in the adjudications only when the instrument, despite its infirmities might have value as a negotiable instrument in the hands of the holder in due course. However, in this case the notes were past due and hence such considerations do not appear. In consequence of the uniform holding that securities which are not effective and operative when taken do not constitute larceny, unless specifically created an offense, various statutory amendments have been made in the various States. See, for example, Section 1292 of the Penal Law of New York State providing that theft of unissued instruments shall constitute larceny. It may well be, too, that the amendment of Section 417 in 1939 referred to at page 11 of the Government's brief and quoted, *supra*, likewise recognizes the necessity for such explicit enactment in order that inoperative securities might be the subject of an offense upon being stolen.

1386

In its original opinion this Court said:

"A lower limit was set for valid security to exclude petty theft; there was none in the case of false securities; and if, as the accused argues, the notes here in question had really been merged, they more nearly approached altered securities than valid ones. They had an actual value of \$5,000, as the record says, even though it was factitious, and would not have survived a full disclosure of the facts."

*Petition for Rehearing by Counsel for Appellant*

1387

These gold notes were not altered. They were not forged and counterfeited. There is nothing in the record or in the notes themselves to support any such statement by the Court. The opinion seems to be mere moralistic argument to the effect that if the bonds did not have the sufficient jurisdictional value, any other means of bringing them in within the statute is justifiable in view of the language with respect to counterfeit bonds. This is nothing more or less than legislation by the Court. The Court erred in this connection, because the gold notes, having merged into an allowed bankruptcy claim, had no value whatever.

1388

**Conclusion**

With the utmost deference to former counsel for appellant, we respectfully urge that his failure to emphasize and even cite *Gable v. U. S., supra*, as well as his failure to fully distinguish *Skelly v. U. S., supra*, may have, to a great extent, brought about the present result. The argument on the question of accessory after the fact was not considered by counsel on either side. Thus, the present discussion of this subject becomes important because of the court's original opinion.

1389

We respectfully urge that a reexamination of the entire matter, accompanied by oral argument, is the only way that the interests of justice can be served.

HENRY G. SINGER,  
*Attorney for Petitioner-Appellant,*

16 Court Street,  
Borough of Brooklyn,  
City of New York.

HARRY SILVER,

*With him on the Petition.*

1390

*Petition for Rehearing by Counsel for Appellant***Certificate**

I certify that this petition for rehearing, in my opinion, is well founded in fact and law and it is not filed for the purpose of delay.

Dated, New York, January 26, 1945.

1391

HARRY G. SINGER,  
*Attorney for Petitioner.*

1392

## Denial of Petition for Rehearing

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES,

*Appellee,*

v.

CHESTER G. BÖLLENBACH,

*Appellant.*

1394

Before:

L. HAND, AUGUSTUS N. HAND, and CHASE,

*Circuit Judges.*

ON APPELLANT'S PETITION FOR REHEARING

HENRY G. SINGER, for the appellant.

PER CURIAM: Petition for rehearing denied.

1395

L. H.

A. N. H.

H. B. C.

C. JJ.

Filed January 31, 1945.



1396

## Order Denying Petition for Rehearing

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

1397

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of January one thousand nine hundred and forty-five.

Present:

HON. LEARNED HAND,  
HON. AUGUSTUS N. HAND,  
HON. HARRIE B. CHASE,

*Circuit Judges.*


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 UNITED STATES,
*Plaintiff-Appellee,*

v.

1398

CHESTER G. BOLLENBACH,

*Defendant-Appellant.*


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A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

ALEXANDER M. BELL,  
Clerk.

*Order Denying Petition for Rehearing*

1399

[BACK]

## UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES,

v.

CHESTER G. BOLLENBACH.

1400

## ORDER

## UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

Filed Jan 31, 1945

1401

ALEXANDER M. BELL,  
Clerk

1402

## Order for Mandate

UNITED STATES CIRCUIT COURT OF APPEALS  
SECOND CIRCUIT

1403

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of January one thousand nine hundred and forty-five.

Present:

HON. LEARNED HAND,  
HON. AUGUSTUS N. HAND,  
HON. HARRIE B. CHASE,

*Circuit Judges.*

1404

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

CHESTER G. BOLLENBACH,

*Defendant-Appellant.*

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

## Order for Mandate

1405

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL  
Clerk

[BACK]

1406

UNITED STATES CIRCUIT COURT OF APPEALS  
SECOND CIRCUIT

UNITED STATES OF AMERICA,

v.

CHESTER G. BOLLENBACH

1407

ORDER FOR MANDATE

UNITED STATES CIRCUIT COURT OF APPEALS  
SECOND CIRCUIT

Filed Jan 31, 1945

ALEXANDER M. BELL,  
Clerk.

1408

## Clerk's Certificate (C. C. A.)

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 469, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

1409

UNITED STATES OF AMERICA,

*Plaintiff-Appellee;*

v.

CHESTER G. BOLLENBACH,

*Defendant-Appellant,*

and

GEORGE A. TURLEY, PETER W. BURNS, HERBERT G.

JACOBSON, FRED BLASER and ERNEST D. INGALLS,

*Defendants.*

as the same remain of record and on file in my office.

1410

(Seal)

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 7th day of February, in the year of our Lord one thousand nine hundred and forty-five, and of the Independence of the said United States the one hundred and sixty-ninth.

ALEXANDER M. BELL

Clerk.



## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 2, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

-(9569)

FILE COPY

Office - Supreme Court, U. S.

FILED

FEB 27 1945

CHARLES ELMORE GROPLEY  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1944

No. **296** ... **41**

CHESTER G. BOLLENBACH,

*Petitioner.*

*against*

UNITED STATES OF AMERICA.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

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BERNARD HERSHKOFF,  
*Attorney for Petitioner.*

HENRY G. SINGER and  
HARRY SILVER,  
*With him on the Brief.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944

No. ....

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**CHESTER G. BOLLENBACH,**

*Petitioner,*

*against*

**UNITED STATES OF AMERICA.**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

*To the Honorable, the Chief Justice, and the Associate  
Justices of the Supreme Court of the United States:*

The petitioner, Chester G. Bollenbach, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this case, January 31, 1945 (1404-6).

**Statement of Jurisdiction**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and by Sections 687, 688, Title 18, U. S. Code, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11.

The Circuit Court of Appeals for the Second Circuit reversed the judgment of conviction on December 5, 1944, and ordered a new trial (1297-1316). A petition for rehearing made by the United States Attorney was duly entertained, and on January 12, 1945, the Circuit Court reversed itself and affirmed the judgment of conviction (1348-1350).

Petitioner filed for rehearing, which was duly entertained and denied on January 31, 1945, when the order for mandate was granted. This petition was filed within thirty days from the date of said mandate in accordance with the rules. Proceedings toward the surrender of the petitioner have been stayed until decision by this Court.

### **Opinions Below.**

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (L. Hand, A. N. Hand and Chase, Circuit Judges) has not yet been reported and is printed in the record at pages 433 to 439. The opinion on rehearing has not yet been officially reported and is printed in the record at page 450.

### **Statement of the Matter Involved**

The judgment of the Circuit Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner of conspiring to violate Section 415 of Title 18, U. S. Code.

The indictment contained two counts; the first count charged petitioner and others with transporting stolen bonds in interstate commerce, and the second count charged the defendants therein with conspiring so to do. (11-17). A severance was granted petitioner. He was tried by jury, acquitted upon the substantive count, and found guilty upon the conspiracy count.

The original reversal of the judgment of conviction was upon the ground that the trial court had erroneously charged the jury on the presumption which arises from possession of recently stolen articles (1041-2, 1306-1316). The error was held to be sufficiently serious to warrant reversal (1315-1316). Upon rehearing on application of the United States Attorney, the Circuit Court, in its second opinion reaffirmed the mistake in the charge but reversed its position and affirmed on the ground that it had overlooked a certain exhibit in the record from which it now held the trial court's error to be negligible (1348-50).

The gravamen of the second count of the indictment upon which petitioner was convicted is that he and others conspired to violate Section 415, Title 18, U. S. Code, in that certain stolen bonds should be transported from Minneapolis to New York (11-12). The indictment did not allege a conspiracy to dispose of the bonds after they came to rest in the State of New York.

The Circuit Court has apparently held that petitioner joined the conspiracy after its alleged and only stated object had been completed. In the original opinion, the Circuit Court said:

" . . . Strictly speaking, that was not any part of the crime for which he [petitioner] had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York" (1309-10).

The foregoing was prompted by recognition that the facts clearly indicated that petitioner did not have anything to do with the stolen bonds until the transportation was completed and that his activities in the matter revolved around the disposition of some of these bonds after they had come to rest in New York State.

## Questions Presented

1. Did the Circuit Court err in sustaining the conviction of petitioner—to use its own language—of an offense “strictly speaking, that was not any part of the crime for which he had been indicted”. (1309-1310)?

2. Did the Circuit Court err in holding under the statute, as it existed when the alleged offense was committed, that the disposal of stolen bonds, which had come to rest in the State of New York, was a federal crime?

3. Did the Circuit Court err in holding, under the statute as it existed at the time of the commission of the offense, that the bonds were of sufficient jurisdictional value, especially since the bonds had merged into an allowed bankruptcy claim and had no value and were not effective or operative instruments?

4. Did the Circuit Court err in reversing its original position that the error in the Trial Court's charge was so serious as to warrant a new trial?

5. Did the Circuit Court err in holding that petitioner was guilty as an accessory after the fact of a conspiracy and sustaining his conviction on an indictment which charged him as a principal?

6. Was the sentence of two years and \$10,000 fine legal?

## Reasons for Allowance of the Writ

1. Each of the questions presented herein embody questions of federal law which have not been, but should be settled by this Court.

2. The decision herein sustaining conviction of an alleged accessory after the fact on an indictment charging him as a principal, departs from the accepted and usual course of judicial proceedings and is a violation of defendant's rights under the Fifth Amendment of the United States Constitution, in that he was held to answer for a crime for which he had not been indicted.

3. The decision herein is at variance and in conflict with the decision of the Seventh Circuit in *Gable v. United States*, 84 Fed. (2d) 929, holding that disposal of stolen securities not stolen while in the course of transportation in interstate commerce does not constitute a federal offense.

4. The decision herein convicts petitioner of an offense which was not a crime when committed but became criminal by subsequent amendments to applicable statutes. These amendments are therefore *ex post facto* as to petitioner and his conviction violates the Fifth Amendment of the Constitution.

5. The decision herein appears to be in conflict with applicable decisions of this Court.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the case numbered and entitled in its docket as "*United States of America, Appellee, v. Chester G. Bollenbach, Defendant, Appellant,*" and that the judgment of said



Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated, February 26th, 1945.

CHESTER G. BOLLENBACH,  
Petitioner.

By BERNARD HERSHKOPF,  
*Attorney for Petitioner,*  
15 Broad Street,  
New York, N. Y.

HENRY G. SINGER, and  
HARRY SILVER,  
*With him on the Petition.*

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I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, February 26th, 1945.

BERNARD HERSHKOPF,  
*Attorney for Petitioner and a member  
of the Bar of this Court.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944

No. ....

**CHESTER G. BOLLENBACH,**

*Petitioner,*

*against*

**UNITED STATES OF AMERICA.**

**BRIEF IN SUPPORT OF PETITION**

**Statutes Involved**

The Federal Statutes involved are Sections 415, 416, 417, 550, 551 and 88 of Title 18, U. S. Code. Pertinent portions of these statutes are quoted in the Appendix.

**Statement of Facts**

**The Indictment**

The indictment contained two counts. The first count charged the transportation from Minneapolis to New York of stolen bonds. The jury acquitted petitioner on this count. The second count, upon which petitioner was convicted, charged that he and several others conspired to transport from Minneapolis to New York twenty-five 6%

Gold Notes of the Minnesota & Ontario Paper Co. of a value of \$5,000 or more, which bonds had been stolen from the office of the Clerk of the United States District Court, a violation of Title 18, U. S. Code, Sections 88 and 415. The overt acts were all laid in New York after the transportation had ended and the bonds had come to rest in that State.

### The Evidence

One of the co-defendants, Burns, stole the bonds involved from the office of the Clerk of the United States District Court at Minneapolis (680, 690-692, 742). Burns arrived in New York with the bonds on January 31, 1937 (940-942, 950). The bonds involved were twenty-five 6% Gold Notes of the Minnesota & Ontario Paper Co. which had been filed together with proofs of claim by the owners of said bonds in a bankruptcy proceeding of the paper company which had been pending in the United States District Court at Minneapolis (2640). After filing, these proofs of claim were allowed on or before January 21, 1935 (Ex. F, 1201-1203).

After the bonds arrived in New York and Burns had encountered some difficulty in the disposition of ten of them (245, 249, 502-511, 421, 281), he called upon petitioner for aid in disposing of the remaining fifteen bonds (1179). The bonds were disposed of through an attorney named Turley, who had been convicted in an earlier trial of this indictment (758, 609, 620, 621, 636, 637, 729). The proceeds of the sale of these bonds were divided in Turley's office and petitioner received about \$900 as his share (1189).

The acquittal of petitioner on the substantive offense, as well as the opinion of the Circuit Court of Appeals (1315-1316), completely removes any doubt on the subject of whether petitioner had anything to do with the stealing of the bonds or their transportation. Petitioner was never in Minneapolis (938, 1152).

It can, therefore, definitely be stated that petitioner's only connection with these bonds arose out of his efforts and assistance in disposing of them after they had come to rest in New York State.

## ARGUMENT

### I

The Circuit Court erred in sustaining the conviction of petitioner—to use its own language—of an offense “strictly speaking, that was not any part of the crime for which he had been indicted” (1309-1310).

The opinion of the Circuit Court of Appeals reads as follows:

“Strictly speaking, that was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York. However, to help dispose of them was to become an accessory after the fact, and that was also a crime (§ 551, Title 18, U. S. C.). It was therefore also a crime to join a conspiracy to dispose of them; and for that crime the conspirators joining after the transportation was over might be indicted as principals. *Skelly v. United States*, 76 Fed. 2d 483 (C. C. A. 10)” (1309-1310).

### A

The above is directly contrary to the provision of the Fifth Amendment of the Constitution which provides that no person may be held to answer for any crime except on the “indictment of a Grand Jury.” It likewise is directly contrary to the fundamental principle of law that a man may not be charged with the commission of one crime and convicted of another.

As Chief Justice MARSHALL said in *The Hoppett*, 11 U. S. 389, 393-4: "The rule that a man shall not be charged with one crime and convicted of another may sometimes cover real guilt, but its observance is essential to the preservation of innocence."

When the Circuit Court said that petitioner's participation in this crime, which was that of the disposal of the stolen bonds, was not "strictly speaking . . . any part of the crime for which he had been indicted," its decision finally determined the issue in so far as petitioner was concerned. Its opinion is clear that petitioner was convicted for a crime not set forth in the indictment and for which he did not stand trial according to the provisions of the Fifth Amendment of our Constitution.

We submit that such a radical departure from the basic concepts of federal jurisprudence provides an urgent necessity that the writ of certiorari here be granted. To permit the present decision of the Circuit Court of Appeals to stand would be to say, that as long as there is any indictment against a defendant, that defendant can be convicted of any crime, even though it is not the offense set forth in the indictment.

Not only is this finding by the Circuit Court of Appeals directly contrary to the rule of law set down by the Supreme Court but it is directly contrary to its own ruling in *United States v. Byers*, 73 Fed. (2d) 419, 421, where it reversed a conviction because defendants who were charged with fraudulent purchase of goods were convicted upon evidence which showed a fraudulent disposition of goods so purchased. The ruling is likewise directly contrary to the holding of the First Circuit in *Malaga v. United States*, 57 Fed. (2d) 822, 825.

The illegal agreement is the gist of the crime of conspiracy. (*Pettibone v. United States*, 148 U. S. 196, 203; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443.) The



agreement or conspiracy alleged in the indictment does not include the disposal of the stolen bonds. It is, therefore, manifest that under any concept of the law or any interpretation of the indictment, petitioner now stands convicted of a crime with which he was not charged and for which he was not tried. There is not a line or phrase in the entire charge of the District Court to the effect that the petitioner was on trial for a conspiracy to dispose of stolen bonds. This new issue, first evolved by the Circuit Court, was never even submitted to the jury.

## B

From a reading of the quoted portion of the Circuit Court's opinion it is not entirely clear whether the Circuit Court was holding that petitioner, having acted as an accessory after the fact, could be convicted under this indictment, or whether the concept of accessory after the fact was used for purposes of analogy in order to fix the petitioner's position in the incidents which formed the basis of the evidence against him. In either respect, the Circuit Court was in error. First, there is no such offense as accessory after the fact to a conspiracy, and a defendant may not be convicted as an accessory after the fact under an indictment which charges him as a principal. (See *infra*, V. p. 22.) Second, under the law as it existed at the time of the alleged offense it was not a crime to conspire to dispose of stolen bonds. (See *infra*, II, p. 14).

Moreover, the fact still remains that neither of the two situations—accessory after the fact, or conspiracy to dispose of the bonds—were presented for determination by the indictment which charged conspiracy to transport stolen bonds and nothing else. A conspiracy is not an omnibus charge, under which you can prove anything and everything and convict for the sins of a lifetime. *United States v. Terry*, 7 Fed. (2d) 28, 1 C. C. A. 9.) The Circuit Court apparently arrived at the unwarranted conclusion that

merely because there was a conspiracy count, proof of any other conspiracy, even though not alleged, was sufficient to sustain a conviction. There was no logical relationship between the first statement that to dispose of the stolen bonds made petitioner an accessory after the fact, and the subsequent conclusion that, therefore, it became a crime "to join a conspiracy to dispose of them" (1309-1310). The steps which led to this final erroneous conclusion completely omitted consideration of the allegations of the indictment which, after all is said, ultimately control.

### C

A generally accepted test of an indictment is whether it would support a claim of double jeopardy under the Fifth Amendment to the Constitution. Assuming that the petitioner should now be indicted for conspiring to dispose of the stolen bonds (if that was a crime), it is the rule under *Burton v. United States*, 202 U. S. 344, 380, that he could not interpose a plea of double jeopardy because both indictments would not allege the same offense. In *Reynolds v. People*, 83 Ill. 479, 481, it was held that an acquittal of one as an accessory "after the fact" was no bar to a prosecution of the same party as a principal in the offense.

### D

The overt acts (13-17, 1305, 1310) refer to matters which occurred only after the bonds came to rest in the State of New York and this was recognized by the Circuit Court when it said: "The fact that the overt acts were all laid at a time after the transportation of the notes had ended in New York presupposes that the accused could not be convicted of a conspiracy which he only joined thereafter" (1305).

Overt acts cannot enlarge the scope of the agreement or conspiracy (*United States v. Britton*, 108 U. S. 192;

*Pierce v. United States*, 252 U. S. 239). The agreement must be preliminary to the commission of the overt act. One can only be guilty of conspiracy if he joined it prior to the commission of the act in pursuance of which it was formed (15 *Corpus Juris Secundum*, Section 75, p. 1107). Incidentally, the overt acts do not mention the disposition of stolen bonds.

Reliance upon *Skelly v. United States*, 76 Fed. (2d) 483 (C. C. A. 10), for a holding that overt acts may be laid after the conspiracy had been completed was error (1310). That case is not authority for that proposition, because the indictment in the *Skelly* case actually alleged a conspiracy to transport a kidnapped person as well as the ransom money across State lines and to change the money into a different form so as to avoid detection and arrest. It is not authority for a holding that a man may be indicted for one crime and convicted of another. A further discussion of the *Skelly* case will be found at page 23, *infra*, V.

The ruling of the Circuit Court on this subject was further error and directly contrary to its own ruling and that of other Circuits, because it is clearly the law that, when the object of a conspiracy is attained, the conspiracy ends and anything which occurs thereafter cannot possibly be any part of the conspiracy (*Lonabugh v. United States*, 179 Fed. 476 (C. C. A. 8); *Gable v. United States*, 84 Fed. (2d) 929 (C. C. A. 7); *De Luca v. United States* (C. C. A. 2) 299 Fed. 741). It is interesting to note that this very question disturbed the trial jury which asked, "Can an act of conspiracy be performed after the crime is committed" (1032). The Trial Court did not answer this question (1306-1307).

Since petitioner was not a party to the scheme prior to the date when the bonds arrived in New York—January 31, 1937—(940-942, 950, 1309), it is error to permit the conviction to stand.

In *Gable v. United States* (*supra*), the Seventh Circuit said, in a case almost identical with ours, where one of the alleged conspiracies was to transport stolen bonds: "The only proof is that after the bonds had been stolen and transported and delivered to him he agreed for a commission, to dispose of the same. This is not proof of the conspiracy charged."

The variance in holding in these two Circuits alone warrants the issuance of the writ.

## II

**Under the statute, as it existed when the alleged offense was committed, the disposal of stolen bonds which had come to rest in the State of New York was not a crime under Federal Law.**

*Gable v. United States*, 84 Fed. (2d) 929 (C. C. A. 7), is complete authority for the above. It has never been overruled.

The only statute which dealt with the disposal of stolen bonds was Section 416, Title 18, U. S. C. This statute was amended on August 3, 1939, about eighteen months after the alleged offense was committed (11-17). The Circuit Court has apparently decided this case without realization that the amendment did not and could not affect the petitioner. Under the law, as it originally existed, it was not a crime to dispose of stolen bonds unless the bonds were stolen while moving in interstate commerce (See Appendix, Section 416, Title 18, U. S. C.).

In the *Gable* case (*supra*), the Court said: "Under the act here relied upon, the receiver is not guilty unless the property which he receives has been stolen while moving in or constituting a part of interstate commerce. In the present case the property received by appellant was not

stolen while moving in such commerce. Rather it was stolen in the State of Missouri, thereafter transported to Chicago, and then delivered to appellant. Consequently, there is no proof of guilt under section 416" (p. 930).

In the instant case the Circuit Court said, quite contrary to the above authority, that it was "a crime to join a conspiracy to dispose of them" (1309-1310). This was error, more particularly since the Court had already held that the bonds had come to rest in the State of New York (1309).

Compare Section 416, Title 18, U. S. C., as amended, with the statute in its original form (Appendix). The new statute removes the condition which required that the bonds had to be stolen while moving in interstate commerce.

### III

**Under the statute, as it existed at the time of the commission of the offense, the bonds were not of sufficient value to bring them within the statute. The bonds having merged into allowed bankruptcy claims, had no value and were not effective or operative instruments.**

The statute, as it existed between January 1, 1937 and January 1, 1938 (13-19), made it an offense to transport stolen bonds "of the value of \$5,000 or more" (See Appendix, Sections 415, 417, Title 18, U. S. C.). On August 3, 1939, these statutes were amended so that the test of jurisdictional value was "face, par or market value whichever is the greatest" (See Appendix Amendments to the above statutes).

The evidence established that the stolen Gold Notes (which we have described as bonds) were affixed to proofs



of claim in bankruptcy which had been allowed on January 21, 1935 (Ex. F, 1201-1203).

The allowance of a claim in bankruptcy has the same legal effect as a judgment (*United States v. American Surety Co. of N. Y.*, 56 Fed. (2d) 734, 736; *Lewith v. Irving Trust Company*, 67 Fed. (2d) 855); into which it is elementary, a cause of action merges (*Hamer v. New York Railways Company*, 244 U. S. 266). Thus the stolen securities herein had merged in the allowed bankruptcy claim and were no longer operative.

When the common law rule, that the theft of securities did not constitute the crime of larceny, was superseded by statutes bringing the theft of securities within the interdiction of the law, the question of the application of the statutes to inoperative and ineffective paper arose. The Courts early held that to constitute larceny under the statutes the written instrument must be effective and operative when taken. See discussion at *People v. Loomis & Ramsdell*, 4 Denio (N. Y.) 380.

In consequence of these early holdings that the theft of securities, which are not effective and operative when taken, does not constitute larceny, statutory amendments became prevalent explicitly extending the larceny statutes to sundry types of inoperative and ineffective securities (see for example, Section 1292 of the Penal Law of New York State).

indeed, in the instant case, the securities were past due and had no value even in the hands of a holder in due course.

It may well be, that the amendment of Section 417, Title 18, U. S. Code, in 1939 (Section 5, of 53 Stat. 1178), setting up the face value of securities as a criterion for ascertaining their jurisdictional value likewise recognizes the necessity for such explicit enactment in order to extend

the coverage of the law to securities such as those in our case. Such amendment, however, was not in effect when the bonds herein were stolen, transported or disposed of.

The Circuit Court recognized that a full disclosure of the facts would show that these stolen bonds did not have an actual value of \$5,000. It said, speaking of these bonds: "They had an actual value of \$5,000, as the record shows, even though it was factitious, and would not have survived a full disclosure of the facts" (1303). At this point it is interesting to note that petitioner was concerned only in the disposition of fifteen of the stolen bonds. Although they had no value whatever, they were sold for \$4,050 (638) —less than the jurisdictional amount.

The Circuit Court attempted to describe the bonds as "altered securities" (1303). The Court also said that "the statute covers 'falsely made, forged, altered or counterfeit securities'" (1302). Here, again, the Court erred, because it decided this question not on the basis of the statute as it existed when the offense was committed, but on the basis of the statute as it existed after the amendment in August of 1939.

Section 415, Title 18, U. S. C., made no reference to altered or forged securities (see Appendix). The first reference to altered or forged instruments is found in the amendment passed after the offense was committed. Petitioner was, therefore, convicted of an offense which did not exist and which was subsequently created by Act of Congress.

## IV

The original finding of the Circuit Court that the error in the charge was so serious as to warrant reversal was correct. The admittedly erroneous charge was tantamount to an instruction to convict. The decision on reargument was error.

## A

## The Admittedly Erroneous Charge

"I further charge you that possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case" (1041-2).

Speaking of this charge, the Circuit Court stated:

"\* \* \* but we think it was wrong to tell the jury that the possession of the notes raised the presumption that the accused was the thief and had transported them in interstate commerce; \* \* \*" (1310).

After discussing *Drew v. United States*, 27 Fed. (2d) 715, 716, and withdrawing the dictum therein upon the ground that it was "an inadvertence" (1314), the Court came to the conclusion that the jury "relied upon the presumption and that it was the keystone of the arch" (1315).

As the Circuit Court stated in its original opinion, the only presumption that can be drawn from possession of recently stolen articles is that of "guilty knowledge" (1312). "Certainly it is untenable to say that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce" (1313).

In order to view this error in its proper setting, reference to the time when and the manner in which the charge was made, is important. The jury had been deliberating for seven hours (from 3:10 to 10:00 o'clock P. M.) (1024-1026), and reported that they were in "a hopeless deadlock" (1026, 1028).

A juror asked:

"Can any act of conspiracy be performed after the crime is committed?" (1032).

The Court failed to answer this question directly (1306). The jury went out a second time and returned at 10:30 P. M. (1035). At this time a note was handed to the Trial Judge with the following question:

"If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?" (1041).

It was in response to this question that the above quoted erroneous charge was given and it is essential to observe that the jury left the courtroom at 10:40 and returned in five minutes, at 10:45, with a verdict of guilty on the second count (1043-1044). The jury's question was directed toward the second or conspiracy count and it is entirely fair to assume, as the Circuit Court of Appeals did, in its original opinion, that the verdict was directly attributable to the erroneous charge.

It has been demonstrated under "I" and "II" (*supra*) that no one can join a conspiracy after its purpose has been accomplished. Therefore, the Court's response to the juror's question was wrong on another account. The answer to the questions should have been a definite and positive "No." When the Trial Court said, "Of course if it occurred afterwards it would not make him guilty, \* \* \*" (1041), it was, to borrow the language of the Circuit Court of Appeals, that "the accused would not be guilty of

conspiracy if he only learned that the notes were stolen after he had disposed of them, he would be guilty, if he learned so before" (1308-9).

The latter was only one way of interpreting the words, "occurred afterwards" as used by the Trial Judge (1041). A more reasonable interpretation in view of what the Court said thereafter would be that knowledge of the stolen character of the bonds acquired after they had come to rest in New York but prior to their disposal, would be sufficient to warrant a conviction on the conspiracy count.

Both of these interpretations lead, however, to the same conclusion, *i. e.*, that the jury relied upon the presumption to find the defendant guilty of conspiracy. As we have demonstrated under "I" (*supra*) the only conspiracy alleged was to transport the bonds, and the Trial Court's erroneous charge that from possession, a presumption of theft and transportation follows, was a direction to convict.

Manifestly, neither of these two—theft or transportation—was the basis of the conspiracy charge. The conspiracy depended upon the agreement, and knowledge acquired after the original agreement of conspiracy had arrived at a completed state, could never revive the conspiracy so as to enable petitioner to join it. The plain effect of the erroneous charge was to tell the jury that under the presumption they could find the petitioner guilty of being a party to a conspiracy to bring the stolen bonds from Minneapolis to New York. That this was error is apparent and uncontroverted.

## B

The Circuit Court has reversed itself on rehearing because of a statement made by petitioner that he knew that the bonds had come "from the west," and that petitioner's counsel had made a similar concession in the brief on the



appeal (1350). In view of this statement and concession, the Circuit Court decided that the error was negligible and could be disregarded. This was error. The jury had before it the statement of petitioner (Exs. 69, 70, pp. 371, 385 of Record). Just before the erroneous instruction was made, the petitioner's statements were discussed in the presence of the jury (1036-1038).

Whether the petitioner knew that the bonds came from the west did not, in any way, devitalize the error in the Court's charge that he was "the thief and transported stolen property in interstate commerce" (1042). As a matter of fact, the statement contradicted this presumption, as appears at folio 1152. Where petitioner said he had never been in Minneapolis in his life, and that the first time he learned of the bonds being in New York was on February 5, 1937 (1121, Ex. 69). In the second statement (Ex. 70) petitioner said that Burns told him that he had "15,000 Minnesota Ontario Paper Co. bonds and wanted to dispose of them" (1177), and that petitioner first learned that the bonds had been stolen "after the bonds had been sold or during the consummation of the selling of the bonds" (1179); and that Burns had brought them "from the west" (1181).

There was nothing in the statements by petitioner to justify a finding that he had joined a conspiracy to bring the bonds from the west. The acquittal on the substantive count demonstrated the jury's belief that the petitioner was not the thief and had not transported them. This was the opinion of the Circuit Court (1315). It having been established, therefore, that petitioner was not the thief and had not transported the bonds, who can now say that the presumption improperly charged by the Trial Court was not the cause of the verdict on the second count?

There is no doubt that the trial jury was convinced that the appellant did not become connected with these bonds in any way until after they had come to rest in the State of

New York. It was this charge on presumption which cemented the contrary unproven and untrue idea in their minds.

It was the duty of the Trial Judge to tell the jury without qualification or modification that if they believed from the facts in the case that appellant had joined in this transaction after the bonds came to rest in New York, and after the crime of transportation was completed, that appellant could not be convicted of a conspiracy to transport them. After all is said, that is the only charge of which he was convicted.

## V

**It was error to hold that petitioner was guilty as an accessory after the fact of a conspiracy, and that an accessory after the fact can be convicted on an indictment charging him as a principal. The sentence was illegal.**

The foregoing represents the alternative view of the Court's equivocal holding under the quoted portion of its opinion set forth under "I" (pp. 9 and 11). In addition, the Circuit Court said (drawing an analogy between this case and the *Drew* case, *supra*): "That was enough, for the accused, once knowledge was brought home to him that the goods were stolen, was guilty either as the thief, or, as we have shown, as accessory after the fact under Section 551 of Title 18, U. S. Code" (1313).

The crime of being an accessory after the fact is defined by Title 18, U. S. Code, Section 551, which also provides that the punishment for such an offense is one-half the maximum punishment which can be meted out to the principal. Accessories before the fact are classed as principals under Title 18, U. S. Code, Section 550. The general rule of law to which no exceptions have been found is that an accessory after the fact must be indicted as such and

cannot be indicted as a principal (*Wharton's Criminal Law*, Sec. 285; 42 *Corpus Juris Secundum*, 1078, Sec. 149; 31 *Corpus Juris*, 845, Sec. 458).

It is well settled at common law that receivers of stolen property are not accessories after the fact. (1 *Bishop Criminal Law* 692, 695, 699; *Wharton's Criminal Law*, Volume 1, p. 370—footnote). An accessory after the fact is one who receives, comforts, or assists a felon. This assistance must be to the person and not the loot. The distinction between an aider and abettor under Section 550 of Title 18, U. S. Code, and an accessory after the fact under Section 551, Title 18, is definite and certain.

The Circuit Court continuing on this line further said that it was also "a crime to join a conspiracy to dispose" of the stolen bonds, "and for that crime, the conspirator joining after the transportation was over might be indicted as principals. (*Skelly v. U. S.*, 76 Fed. (2d) 483, C. C. A. 10)" (1309-10). In this statement, the Court fell into error because there is no relationship between the indictment in this case and the one in the *Skelly* case (*supra*). The language of the two indictments differs as to the purpose to be accomplished by the conspiracy. The indictment in the *Skelly* case charged a comprehensive conspiracy to transport a kidnapped person as well as the ransom money across state lines. It charged, as part of the illegal agreement, the changing of the money into different form so as to "avoid detection, apprehension and arrest." In our case, the only allegation which appears in the indictment of the purpose of the conspiracy is to transport the stolen bonds from Minneapolis to New York and to violate Title 18, U. S. Code, Section 415, which refers to the transportation of stolen bonds.

It is thus apparent that the Circuit Court in its very opinion, recognizes that the defendant did not conspire to transport the stolen bonds (1309). It is true that every

person who joins a conspiracy becomes criminally liable. However, when the purpose of the conspiracy has been accomplished there is no conspiracy to which anyone could attach himself. We have been unable to find a single authority for the proposition advanced by the Circuit Court of Appeals to the effect that there is such an offense as an accessory after the fact to a conspiracy. The discussion of accessories after the fact in the lengthy footnote at 76 Fed. (2d) 488, does not sustain the Circuit Court's contention.

Assuming *arguendo* that the accessory theory could be sustained it would necessarily follow that petitioner could only be punished according to the provisions of the accessory statute (Section 551, Title 18, U. S. C.) which provides for a sentence of one-half of the maximum originally fixed for the offense. Conspiracy under Section 88, Title 18, U. S. C., may be punished by a maximum of two years imprisonment and \$10,000 fine. Therefore, the punishment of an accessory after the fact is limited to a punishment of one year's imprisonment and a \$5,000 fine. The Court here imposed the two years imprisonment and a \$10,000 fine; and if the accessory after the fact theory is correct, the sentence is clearly illegal and must be reduced to not more than one year and \$5,000 fine.

## CONCLUSION

**The writ of certiorari should be granted.**

Respectfully submitted,

BERNARD HERSEKOPF,  
*Attorney for Petitioner.*

HENRY G. SINGER and  
HARRY SILVER,  
*With him on the Brief.*

## APPENDIX

### Section 88, Title 18, U. S. Code

(Criminal Code, section 37.)—Conspiring to commit offense against United States.—if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

### Section 415, Title 18, U. S. Code—before amendment

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both.

### Section 415, Title 18, U. S. Code—as amended August 3, 1939

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged,



altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, or whoever with unlawful or fraudulent intent shall transport, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:261) or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 3, 48 Stat. 794; Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178).

**Section 416, Title 18, U. S. Code—before amendment**

Same; receipt or disposal of goods, securities or money feloniously taken while a part of interstate commerce.—Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities of the value of \$500 or more which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken, shall be punished by a fine of not more than \$10,000 or by imprisonment of not more than ten years, or both. (May 22, 1934, c. 33, sec. 4, 48 Stat. 795.)

**Section 416, Title 18, U. S. Code—as amended August 3, 1939**

Same; receipt or disposal of goods, securities or money feloniously taken; receipts of articles used in counterfeiting. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce knowing the same to have been stolen, unlawfully converted, or taken, or whoever shall receive, conceal, store, barter, sell, or dispose of any falsely made, forged, altered, or counterfeited securities, or whoever shall pledge or accept as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited, or whoever shall receive in interstate or foreign commerce, or conceal, store, barter, sell, or dispose of, any such bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in Section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:251) or (2) an obligation, bond, certificate, security, Treasury note, bill, promise to

pay, or bank note issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 4, 48 Stat. 795; Aug. 3, 1939, c. 413, sec. 2, 53 Stat. 1178).

**Section 417, Title 18, U. S. Code—before amendment**

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof (Sections 415, 416 of this title). (May 22, 1934, c. 333, sec. 5, 48 Stat. 795).

**Section 417, Title 18, U. S. Code—as amended August 3, 1939**

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of section 3 and 4 hereof (Sections 415, 416 of this title), and the value of any securities referred to shall be considered to be the face, par, or market value, whichever is the greatest.

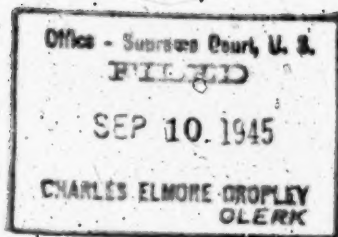
**Section 550, Title 18, U. S. Code**

(Criminal Code, section 332). "Principals" defined.—Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

**Section 551, Title 18, U. S. Code**

(Criminal Code, Section 333). Punishment of accessories.—Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.

FILE COPY



IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 41

CHESTER G. BOLLENBACH,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

BRIEF ON BEHALF OF THE PETITIONER

BERNARD HERSHKOFF,

HENRY G. SINGER,

HARRY SILVER,

*Counsel for Petitioner.*



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IN THE  
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OCTOBER TERM, 1945

**No. 41**

CHESTER G. BOLLENBACH,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA

**BRIEF ON BEHALF OF THE PETITIONER**

**Preliminary Statement**

The cause comes before the Court upon a writ of certiorari allowed by this Court on April 2, 1945 (p. 471; 65 Sup. Ct. Rep. 915; 323 U. S. page III, Advance Sheet No. 4, not yet officially reported), to review a judgment of the Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York convicting the defendant of the crime of conspiracy to transport in interstate commerce securities of the value of \$5,000 or more, knowing them to have been stolen (<sup>1</sup> pp. 403, 468-69).

<sup>1</sup> Unless otherwise stated, the page and folio references in this brief are to the printed transcript of the record.

There was no opinion delivered by Judge Moscovitz in the District Court. The opinion originally delivered in the Circuit Court of Appeals reversed the judgment of conviction and ordered a new trial (pp. 433-39). On application of the United States for rehearing, however, the court below changed the last paragraph of its prior opinion, and thereupon affirmed the conviction (p. 450). Its opinion, as thus corrected, is reported in 147 F. (2d) 199.

The jurisdiction of this Court is invoked pursuant to section 240 (a) of the Judicial Code, as amended February 13, 1925 (c. 229, 43 Stat. 936).

The statutes involved herein are all part of Title 18 of the United States Code, being sections 88, 415, 416, 417, 550, and 551 thereof. The sections of the National Stolen Property Act (i. e., secs. 415, 416, and 417 of the United States Code, above referred to), as they stood prior to amendment on August 3, 1939, are the only sections of that statute applicable in the case at bar. The pertinent portions of the foregoing enactments are quoted in the discussion which follows; and the statutes, as they were before and after said amendment, are printed in full in the appendix to this brief.

## **Statement of Case**

### *Introduction*

The defendant-petitioner herein was indicted in the Southern District of New York on two counts (pp. 3-6). The first count charged the defendant and others with transporting stolen securities in interstate commerce from Minneapolis in Minnesota to New York City (pp. 3-4). The second count charged the same parties with conspiring so to do (p. 4). A severance was granted the defendant-petitioner (fol. 4). On the trial, he was acquitted of the substantive crime, but found guilty upon the conspiracy



count (fols. 4, 1044). He was thereupon sentenced to two years' imprisonment and fined \$10,000 (fols. 5, 1046, 1207-9).

In its original opinion, the court below reversed the conviction, because the trial judge had erroneously charged the jury that the possession of the stolen securities by the defendant raised a presumption that he had transported them in interstate commerce (fols. 1041-42, 1306-16). In its opinion on the rehearing, however, the Circuit Court of Appeals, while reaffirming its holding that that charge of the trial court was erroneous, nevertheless held that the error was negligible, because of the fact that the defendant knew that the stolen bonds came from another state (p. 450).

There was no proof in the case that the defendant had stolen or transported the securities. Indeed, his acquittal on the first count constituted a clear finding of the jury to the contrary. His connection with the transactions in question, as the court below itself recognized (fols. 1305, 1309), came afterward, after the bonds were stolen and had come to rest in New York. Then it was that he helped to dispose of some of them.<sup>2</sup> The indictment, however, alleged no conspiracy to dispose of the stolen securities; it concerned itself solely with a conspiracy to transport them from Minneapolis to New York (p. 4). And, manifestly, that conspiracy was concluded before the defendant aided in selling any of the bonds or notes. That fact, too, the Circuit Court of Appeals acknowledged. It said (fol. 1309):

"Strictly speaking, that [i. e., the disposal of the bonds] was not any part of the crime for which he was indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York."

<sup>2</sup> That was conceded by the Government in its brief (p. 10) in opposition to our application for a writ of *certiorari*. It was there stated: "The jury had apparently also already agreed that petitioner was not himself guilty of transporting the bonds . . . he participated in the transaction only after the bonds were brought to New York."

Obviously if both of the crimes charged in the indictment ended when the stolen securities reached New York, it is certainly difficult to perceive how the defendant's knowledge when, or after, he helped to dispose of the bonds, that they had been stolen out west, would reopen the already concluded conspiracy and render him a party to the previously completed conspiracy to transport the bonds. Plainly the Circuit Court of Appeals had no warrant in that fact for holding the defendant to be a co-conspirator and changing its original decision.

### *Summary of Pertinent Facts*

Although the record is fairly long, the facts necessary to a disposition of the case at bar lie within narrow compass. Prior to 1935 the Minnesota & Ontario Paper Company was in bankruptcy in the United States District Court at Minneapolis (fols. 82-3). In that proceeding, creditors had filed proofs of claim and had attached thereto their 6 per cent gold notes of the company, due March 1, 1931 (fol. 43). January 21, 1935, those claims were allowed as filed (Ex. F, p. 401).

In January, 1937, one Peter W. Burns was in the Minneapolis courthouse several times (fols. 936-37, 943). While there, he stole twenty-five of the aforesaid gold notes which were attached to proofs of claim (fols. 26-40, 44-49, 680, 690-92, 742-43, 1180-81). Burns returned to New York City on Sunday, January 31, 1937 (fols. 940-42).

The defendant in the case at bar never was in Minneapolis (fols. 181-3, 186, 205-7, 938, 1152). Indeed, on February 1, 1937, he and his brother were in Shamokin, Pennsylvania, where he stayed at a hotel, attended a stockholders' meeting, and wrote his wife a letter (pp. 322-26; Ex. E, p. 400). Nevertheless, this was the day when the thoroughly discredited witness Chell Smith (pp. 34-56) pretended he saw

the defendant in Minneapolis (fols. 930-31). The jury quite obviously did not believe that plainly incredible testimony; nor did they believe that the defendant was in Minneapolis when the bonds were stolen, since they acquitted the defendant of the charge of transporting the securities from Minneapolis to New York.

After Burns returned to New York with the stolen securities on January 31, 1937, he took steps looking to the disposition of the stolen securities. The following day, Monday, February 1, 1937, Burns, using the alias Arnold Berendson, under which he was indicted (fol. 8) and by which he was known (fol. 517), telephoned the brokerage house of Hart Smith & Company, and inquired whether they could sell some Minnesota & Ontario Paper Company gold notes for him (fols. 240-43). Subsequently Hart Smith & Company purchased ten of those gold notes from Berendson (fols. 243-44, 245, 249). On February 3, 1937, they issued their check for \$2500 in payment for the ten bonds (fols. 249, 276-77; Ex. 7, fol. 1052). A typewritten endorsement was thereupon placed on the check (fol. 1052), and Burns opened an account with it, in the name of Arnold Berendson, at the National Safety Bank & Trust Company on the same day (fol. 504; Ex. 23-25, fols. 1064-67, 397-404). The bank, however, declined to clear the check without a personal endorsement by Berendson (fols. 417-18). Thereupon Burns employed Manning & Company to endeavor to secure from the bank either payment of the check or the return thereof (fols. 491, 505-9). One Jacobson introduced Burns to Manning, calling Burns by the name of Berendson on that occasion (fols. 502-4). However, Manning & Company did not succeed in doing anything for Burns; payment had been stopped on the check, and Burns never got back either the ten stolen notes nor the \$2500 check given therefor (fols. 281-2, 297, 421).

Having had this difficulty in respect of the first ten stolen bonds, Burns now sought help in disposing of the remaining fifteen. To that end, he called on the defendant (fol. 1179) on about the fifth of February, 1937 (fols. 728-29, 743, 942-43). The defendant suggested that they take the matter up with one Turley, a lawyer who had an interest in the brokerage firm of Blaser & Ingalls (fols. 609, 758, 1179). Neither Blaser nor Ingalls had ever met the defendant before (fols. 618, 728). Turley thereupon arranged a meeting of the parties, with the result that Turley had Blaser & Ingalls sell the remaining fifteen Minnesota & Ontario Paper Company gold notes on February 8, 1937, for \$4,050 for the account of a fictitious Walter T. Roberts, who purported to reside at the Hotel New Yorker (fols. 620-21, 633-34, 636-40; Ex. 48-50, p. 364). It was Burns who went to the Hotel New Yorker to establish the hotel as the address of the alleged Roberts, and to obtain hotel stationery to use in the transaction (fols. 1184-85; Ex. 48, fol. 1090). Out of the \$4,050 realized on the sale of the fifteen notes, Turley gave the defendant what in the end amounted to about \$900 (fol. 1189).

The Court will not fail to observe that the defendant-petitioner's participation relates entirely to the disposition of some of the stolen bonds, and has nothing to do with their theft or transportation.

### *Questions Presented*

The exceptions of the defendant<sup>3</sup> and the assignments of error<sup>4</sup> present the questions enumerated below:

<sup>3</sup> Exceptions: fols. 198, 201, 241, 243, 288-96, 308-11, 381-91, 398, 402-3, 408-13, 418, 425-26, 447, 449-50, 466-67, 510, 524-25, 526-27, 612, 627-28, 634, 639, 641-42, 655, 663-64, 667, 669-70, 672-75, 763, 765, 766, 911, 91 920; 924-28; 929, 982, 1036, 1039, 1040, 1042-43, 1044-45.

<sup>4</sup> Assignments of errors: fols. 1220-23, 1233-34, 1236-46, 1264-68, 1269-86.

1. Did the court below err in sustaining the conviction of the defendant-petitioner of an offense which, in the language of that court itself (fol. 1309), "was not any part of the crime for which he had been indicted"?

2. Did the court below err in ruling that, under the statute in the form in which it was when the alleged offense was committed, the disposal of securities, at rest in New York and stolen while not moving in or constituting part of interstate commerce, constituted a crime against the United States?

3. Did the court below err in holding that this defendant was guilty as an accessory after the fact of a conspiracy, and in sustaining his conviction on an indictment which charged him as a principal and not otherwise and in thereupon upholding his sentence as such principal, when it was double that which could be lawfully inflicted upon an accessory after the fact?

4. Did the court below err in reversing its original holding herein that the erroneous charge given by the trial judge warranted a new trial?

5. Did the court below err in holding that, under the statute as it stood at the time when the alleged offense was committed, the stolen securities had the necessary value prescribed in said statute, particularly in view of the fact that these securities had theretofore been merged into allowed claims in bankruptcy and thus were no longer operative instruments having any value?

### **BRIEF SUMMARY OF PETITIONER'S CONTENTIONS**

Point I in the argument below discusses the first of the foregoing questions; point II deals with the second and third questions; point III is concerned with the fourth question, and point IV considers the fifth question.



It is petitioner's contention that the court below erred in its determination of each of the foregoing questions. It is respectfully submitted that, under the federal statute, as it stood when the alleged offense was committed and prior to the amendment thereof a year and a half later, it was not a crime against the United States to help dispose of securities stolen while not a part of interstate commerce, nor to conspire to that end.

Some additional facts, and an account of pertinent proceedings, both at the trial and in the court below, are set forth in the following points, in order to avoid repetition.

## ARGUMENT

### I.

The court below erred in sustaining the conviction of the defendant of an offense which was no part of the crime for which he was indicted.

As has already been stated, the indictment charged the defendant herein with two offenses: one was the substantive crime of transporting and causing to be transported in interstate commerce the stolen bonds or notes, and the other was the crime of conspiring with others to transport those bonds or notes in interstate commerce (pp. 3-4). The acquittal of the defendant on the first count, which charged the substantive crime, absolved him of all complicity in the theft and transportation of the bonds, whether as principal or as aider and abettor. This Court is therefore now concerned only with the second or conspiracy count of the indictment, that being the only offense of which the defendant stands convicted.

Perusal of the second count in the indictment (p. 4) will at once disclose that the sole conspiracy which it alleges is a conspiracy to transport and cause the stolen bonds to be transported from Minneapolis in Minnesota to New

York City. It charges nothing else. It does not declare upon any conspiracy to sell, or otherwise dispose of the bonds, *after* they were transported from Minneapolis to New York.<sup>2</sup> The only accusation, of whose nature and cause the defendant was informed by the second count in the indictment as required by the sixth article of amendment to the Constitution, was the accusation of a conspiracy to transport the stolen bonds in interstate commerce. That is therefore the only charge on which he could be lawfully convicted under the second count of the indictment.

"A conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime." *Terry v. United States*, 7 F. (2d) 28, 30. If the constitutional mandate in the fifth amendment, that no person shall be held to answer for an infamous crime except upon a presentment or indictment of a grand jury, is to be respected, the crime charged by the grand jury—and no other crime—can furnish the basis for a conviction. The charge is, consequently, necessarily limited to that which is set forth in the indictment; and to that alone. Accordingly, it is our firmly established law that a defendant may not be indicted for one conspiracy and then be convicted thereunder of another conspiracy. *Terry v. United States*, 7 F. (2d) 28; *Malaga v. United States*, 37 F. (2d) 822, 825; *United States v. Byers*, 73 F. (2d) 411, 421, 422.

In the *Byers* case, *supra*, the indictment accused the defendants of a conspiracy fraudulently to purchase goods of the United States. They were convicted, however, of a conspiracy to dispose of the goods in fraud of the United States. The Circuit Court of Appeals reversed the conviction. It pointed out (73 F. (2d) at pp. 421, 422) that:

"A conspiracy so to sell is not charged in any way in the indictment. To find the defendants guilty of

a conspiracy to sell is to find them guilty of something with which they are not charged \* \* \*. It is necessary that a defendant be found guilty, if at all, only of the crime charged in the indictment. A conviction for one conspiracy cannot be sustained under an indictment for a separate and distinct conspiracy."

As Chief Justice Marshall long ago observed (*The Schooner Hoppett v. United States*, 7 Cranch 389, 393-4):

"The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence."

It is therefore of first importance in the case at bar to bear in mind that this defendant had no part in the transportation of the stolen bonds; the jury acquitted him of that charge. The evidence showed that his connection with the bonds arose only after they had been transported from Minneapolis to New York and had come to rest here. What he did had to do exclusively with efforts to dispose of the bonds after they reached their intended destination. Such conduct may have been violative of the law of the State of New York, but it is clear that it did not constitute a part of any conspiracy to transport the stolen bonds from Minneapolis to New York. That offense—the only federal offense of which he was convicted—ended with the completion of the transportation.

The object of the conspiracy charged was to transport the bonds to New York. It was not charged that the conspiracy had any additional purpose, as, for example, to dispose of the bonds after they arrived in New York. It is the assumption to the contrary (Vols. 1309-10) which misled the court below.

It is manifest that the object of the conspiracy alleged was fully attained when the bonds came to New York;

and, under this indictment, what happened to them thereafter was quite immaterial. Whether or not the bonds were subsequently sold or otherwise disposed of, the conspiracy averred in the indictment was complete, finished, and consummated; and what happened thereafter could not constitute any part of the conspiracy charged, since that conspiracy had already become an executed transaction and passed into history.

The court below expressly recognized that to be the fact. In its opinion, it first observed that "the fact that the overt acts were all laid at a time after the transportation of the notes had ended in New York presupposes that the accused could not be convicted of a conspiracy which he only joined thereafter" (fol. 1305); and, referring to the fact that the defendant joined only in the disposal of the stolen securities after their transportation had ended, the Circuit Court of Appeals declared (fol. 1309) that:

"Strictly speaking, that was not any part of the crime for which he was indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York."

The Court below, however, went on to say that it was also a crime to dispose of the bonds, and "therefore also a crime to join a conspiracy to dispose of them" (fol. 1309). In other words, while it in effect acknowledged that the defendant was not guilty of any conspiracy to transport the bonds, it declared that he was guilty of a quite different conspiracy, namely, one to dispose of the bonds. Even if we assume for the purposes of the argument, that the defendant was involved in a conspiracy to dispose of the bonds, the fact nevertheless still remains that the indictment nowhere charges any conspiracy to dispose of the bonds; that it confines itself entirely to a

conspiracy to transport the bonds; and hence it is quite apparent that, while the court below found the defendant guiltless of the only conspiracy for which he was indicted, it nevertheless affirmed his conviction of *that* crime, solely because it regarded him as guilty of another crime, a conspiracy not even mentioned in the charge for which he was tried and of which convicted. We repeat what was said in *United States v. Byers*, 73 F. (2d) 419, 422:

“A conviction for one conspiracy cannot be sustained under an indictment for a separate and distinct conspiracy.”

No other result is consonant with reason. The illegal agreement is the gist of the crime of conspiracy. *United States v. Britton*, 108 U. S. 199, 204; *Hyde v. Shine*, 199 U. S. 62, 76; *United States v. Cohen*, 145 F. (2d) 82, 94. In the case at bar, therefore, the heart of the crime in question consists of the conspiracy to transport, and nothing else. Nowhere—not even in the overt acts alleged (pp. 4-6)—is the defendant charged with any conspiracy to dispose of the goods after their transportation was concluded. Hence it is patent that the object of the conspiracy alleged was accomplished in the case at bar. And obviously one cannot join a conspiracy after it is all over and done. *Lonabaugh v. United States*, 179 Fed. 476; *De Luca v. United States*, 299 Fed. 741, 745; *Gable v. United States*, 84 F. (2d) 929. One of the jurors in this case apparently had that thought in mind, for he asked the trial judge, “Can an act of conspiracy be performed after the crime is committed?” (fol. 1032); but, despite the clearly settled law, the judge made no answer to the question (fol. 1306).

In the *Gable* case, *supra*, the Court of Appeals of the Seventh Circuit had before it a charge that the defendant had engaged in a conspiracy to transport stolen securities in interstate commerce. There the bonds had been stolen



in Missouri and brought to Chicago. "Upon arrival in Chicago they were taken to the appellant [Gable] for sale" (84 F. (2d) at p. 930). He thus had part in the disposal of the stolen bonds. Nevertheless, the court held that he was not guilty of any federal crime. It ruled as follows (84 F. (2d) at p. 930):

"Nor is there any proof of conspiracy upon the part of appellant to transport in interstate commerce stolen property . . . . *The only proof is that after the bonds had been stolen and transported and delivered to him, he agreed, for a commission, to dispose of the same. This is not proof of the conspiracy charged.* With what his guilt may be under the statute of Illinois governing criminal offenses, we are not concerned" (Italics ours).

The decision in *Shelly v. United States*, 76 F. (2d) 483, is not opposed to the foregoing. There the indictment was not limited to a conspiracy merely to transport the kidnapped person in interstate commerce; it set forth a much more comprehensive conspiracy, namely, a conspiracy first to kidnap and transport in interstate commerce, then to hold for ransom, then upon receipt of the ransom money to convert that money into other money or securities in order to avoid detection, etc. (*id.* at p. 485). All that was alleged to be the conspiracy of the defendants. What was there done subsequent to the transportation of the kidnapped person was consequently part and parcel of the original and only conspiracy charged. It was not, as in the case at bar, wholly outside of and apart from the conspiracy averred in the indictment.

Since the defendant was not party to the conspiracy to transport the bonds from Minneapolis to New York, it is submitted that his subsequent conduct in relation to the disposal of the stolen property furnished no warrant for his conviction under the second count of this indictment.

## II

A. The court below erred in ruling that, under the statute in the form in which it was when the alleged offense was committed, the disposal of securities, at rest in New York and stolen while not moving in or constituting a part of interstate commerce was a crime against the United States.

B. It further erred in holding that the defendant was an accessory after the fact of a conspiracy, when he was not indicted as such; and in thereupon upholding his sentence, although it was double that which could be lawfully imposed upon an accessory after the fact.

A. The crime in question in the case at bar was committed in 1937 and 1938, according to the indictment (fol. 11). During all of that period, section 416 of title 18 of the United States Code (Act of May 22, 1934, c. 33, sec. 4, 48 Stat. 795) proscribed as criminal the receipt, sale, or disposal of securities which had been stolen "while moving in or constituting a part of interstate or foreign commerce." Quite plainly that enactment did not make the disposal of stolen securities a federal offense under any and all circumstances. The statute manifests no such purpose. As its language plainly declares, sale and disposal of stolen securities was made a crime against the United States, *only* if the theft occurred while the securities were moving in or a part of interstate commerce. And that was expressly ruled by the Circuit Court of Appeals in *Gable v. United States*, 84 F. (2d) 929, 930. The court there held that:

"Under the act here relied upon, the receiver [of the stolen securities] is not guilty unless the property which he receives has been stolen while moving in or constituting a part of interstate commerce. In the

present case the property received by appellant was not stolen while moving in such commerce. Rather it was stolen in the State of Missouri, thereafter transported to Chicago, and then delivered to the appellant. Consequently, there is no proof of guilt under section 416."

On August 3, 1939, long after the commission of the alleged crime in this case, the statute was materially amended (Act of Aug. 3, 1939, c. 413, sec. 2, 53 Stat. 1178). It is unnecessary, however, to discuss that amendment in this relation. It cannot affect the situation now before the Court. If it made that criminal which was not criminal at the time when it was done, the amendment would plainly constitute an invalid *ex post facto* law. Constitution, Art. I, sec. 9; *Calder v. Bull*, 3 Dall. 386, 390; *Kring v. Missouri*, 107 U. S. 221, 225, *et seq.*

Hence it is indisputable that, when the alleged criminal act was committed in the case at bar, there was no federal law which denounced as criminal the disposition of stolen securities, unless they had been stolen while moving in or a part of interstate commerce. *Gable v. United States*, 84 F. (2d) 929, 930. Here, however, the bonds were stolen while at rest in Minneapolis and before they ever were transported in or became a part of interstate commerce at all; and hence section 416 of title 18 of the United States Code was plainly not applicable.

As disposal of securities, not stolen while in interstate commerce, was not a federal offense, under the statute governing this case, it is clear that a conspiracy to dispose of such property could not violate the law which forbids parties to conspire to commit an offense against the United States (sec. 88, title 18, U. S. Code). Hence it is impossible to perceive how the court below could hold that it was a federal "crime to join a conspiracy to dispose of" the stolen bonds in this case (fol. 1309).

B. The court below apparently also believed that it was justified in regarding this defendant as an accessory after the fact and, on that score, in holding him guilty of the crime of which he was convicted. That theory was not urged by the Government in the courts below. It was never mentioned to the jury; and it is certain that they regarded the defendant, not as an accessory after the fact, but as a principal. This new theory is predicated on section 551 of title 18 of the United States Code, which is not even referred to in the indictment; and nothing in the indictment makes even the remotest mention of the defendant's conduct in disposing of the stolen securities, or of his being charged with being an accessory after the fact (pp. 3-6).

In view of the fact that section 551 provides that an accessory after the fact shall be liable only to one-half the punishment prescribed for the principal, it is, moreover, plainly necessary that the indictment should charge him as such, to the end that, if convicted, the court may know that he has not been found guilty as a principal and may not erroneously punish him as such. Wharton, Criminal Law, sec. 285; 42 C. J. S. 1078, sec. 149; 31 Corpus Juris 845, sec. 458. In the case at bar, however, the defendant was sentenced, not as an accessory after the fact, but to two years' imprisonment and to a \$10,000 fine (fol. 1046; p. 403), the maximum penalty prescribed for principals in the crime of conspiracy (sec. 88, title 18, U. S. Code). It is therefore quite plain that this conviction has been affirmed on a theory which never occurred to anyone in the case until it was evolved in the court below.

Analysis of the doctrine thus enunciated in the opinion below, soon demonstrates its erroneous character. The acquittal of the defendant establishes that he was neither a principal nor an accessory before the fact in so far as the transportation of the securities in interstate commerce is

concerned; and the court below itself recognized that he had no part in the conspiracy to transport the stolen securities from Minneapolis to New York (fols. 1305, 1309). His participation had to do exclusively with the disposal of the securities after they came to rest in New York; and, as the court below itself noted (fol. 1309) what he did thereafter "was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York."

In helping a thief to dispose of stolen property in New York, one might perhaps be deemed an accessory after the fact of the larceny. But that would not be a crime against the United States; and the defendant was not charged with or tried for that offense. Moreover, it is well settled at common law that receivers of stolen property are not accessories after the fact. 1 Bishop, Criminal Law, 692, 695, 699; Wharton, Criminal Law, vol. I, p. 370, footnote.

And it is, furthermore, simply impossible to regard the defendant as an accessory after the fact in respect of the crime of conspiracy. The conspiracy in the case at bar was over and finished when the property came to rest in New York. The subsequent disposal of the stolen property might perhaps be regarded as accessory after the fact of the theft; but it had and could have no relation to the executed conspiracy. Persons may aid conspirators while the conspiracy is still open and in progress, and, if they do, they become parties to the conspiracy as principals, and not as accessories at all. But when the conspiracy is ended, that crime is finished; and no one can then be an accessory after the fact in respect thereof, and certainly not in any such sense as shall render him liable as a co-conspirator and a principal. Such a rule would simply nullify the long-settled doctrine that one is not a party to a conspiracy who acts



only after the fulfillment of the object of the conspiracy and the end thereof. *Lonabaugh v. United States*, 179 Fed. 476; *De Luca v. United States*, 299 Fed. 741, 745; *Gable v. United States*, 84 F. (2d) 929.

It was not error to hold that the defendants in the *Skelly* case, 76 F. (2d) 453, were co-conspirators, because they became parties to an open and existing conspiracy. But that is the precise contrary of the situation in the case at bar: here the conspiracy charged was ended, as the court below conceded (fol. 1309), when the transportation terminated and the securities "came to rest in New York."

The injustice of the rule laid down in the court below is perhaps made clearer when it is considered from the standpoint of protecting the defendant from subsequent prosecution for the offense of which he has now been convicted. If the defendant were hereafter to be indicted for conspiring with the others to dispose of the stolen securities, the present conviction would not enable him to maintain a plea of double jeopardy. To do so, the defendant would have to show that the prior prosecution was "for the same identical offense." *Burton v. United States*; 202 U. S. 344, 380; *Montrose Lumber Co. v. United States*, 124 F. (2d) 573, 575. The indictment in this case, however, says nothing about being an accessory after the fact, or about disposing of the stolen property, or about conspiring so to do. It manifestly concerns itself with a quite different offense. In *Reynolds v. People*, 83 Ill. 479, 483, it was held that an acquittal of a defendant as an accessory after the fact did not bar his prosecution as a principal in the offense itself. The court said:

"The offense of which an 'accessory after the fact' may be guilty, is not included, nor has it any connection, with the principal crime. This is apparent from the definitions given, both in our statute and in the common law. The one cannot be committed until the principal

offense is an accomplished fact \* \* \*. The guilty knowledge, which is the essence of the offense, comes after the principal crime is committed, and of course they can have no connection with each other. But no better test need be sought than the fact that a party indicted as a principal and acquitted may yet be indicted as an 'accessory after the fact,' or if indicted as an 'accessory after the fact' and acquitted, he may be indicted as a principal, and the reason assigned in the common law authorities is, that they are 'offenses of several natures.' Hence a conviction of one is no bar to a prosecution for the other."

The foregoing considerations are undoubtedly the reasons which underlie the well-established rule that an accessory after the fact must be indicted as such. Wharton, Criminal Law, vol. I, sec. 285; 42 C. J. S. 1078, sec. 149; 31 Corpus Juris, 441, 845, secs. 291, 458.<sup>5</sup>

Accordingly, it is submitted that it was error for the court below to affirm the defendant's conviction of the conspiracy charge on the theory that he was an accessory after the fact of that crime and thus became a co-conspirator after the conspiracy terminated. In addition, if the defendant was an accessory after the fact, his sentence was manifestly excessive and illegal.

### III

The court below erred in reversing its original holding that the erroneous charge of the trial judge warranted a new trial.

The strong feeling of the trial judge that the defendant was guilty of both of the offenses charged in the indictment,

<sup>5</sup> "An accessory after the fact cannot be convicted on an indictment charging him as principal." Wharton, Criminal Law, vol. I, sec. 285.

"The accessory after the fact is left by the statutes generally as at common law; he must be indicted as such, and cannot be treated as a principal." 42 C. J. S. 1078, sec. 149.

clearly appears from the record (e. g., fols. 918-22, 1045). When, therefore, the jury at 10 o'clock at night reported that it was in "a hopeless deadlock" and unable to agree (fols. 1026, 1027), about seven hours after the cause had been submitted to them (fols. 1024, 1026), the trial judge, without any request from them (fols. 1027-28), deemed it his duty to give them further instruction on the law (fol. 1028 *et seq.*). In the proceedings which then ensued, the trial judge made it plain enough that he thought that the defendant should be convicted, although of course he did not say so in so many words. In addition to the plainly erroneous directions which are discussed below, the trial judge then said (fols. 1032, 1034, 1035):

• "I want you to go out and deliberate, and I don't want you to be fooled in this case" • • •

"I think in this case there ought not to be any difficulty in coming to a proper verdict" • • •

"I am going to wait here until half-past ten. You don't have to agree by half-past ten, but if you haven't agreed by that time I will send you to a hotel to-night. That doesn't mean you have to agree at 10:30. You can take as much time as you want, tonight, tomorrow and tomorrow night if you need it."

The trial judge then charged the jury that recent possession of stolen property by the defendant, if unexplained, justified the conclusion by the jury that the defendant knew the property was stolen (fols. 1028-30). There was no need for that instruction in the case at bar. In his statement to the government's representatives, the defendant had admitted that he learned that the bonds were stolen "after the bonds had been sold or during the consummation of the selling of the bonds" (fols. 1178-79). Such a direction could therefore only tend to confuse the jury.

A juror then asked (fol. 1032): "Can any act of conspiracy be performed after the crime is committed?" The

court turned that question aside with a quite irrelevant response (fol. 1032). Of course it should have been answered directly and fully. The jury should have been told, clearly and pointedly, that the only conspiracy charged had for its object the carriage of the stolen securities from Minneapolis to New York; that that conspiracy came to an end when its object was attained, when the bonds came to rest in New York; and that what happened thereafter could not make the defendant a party to the antecedent conspiracy charged in this indictment. It was manifestly his failure thus to instruct the jury which subsequently resulted in their sending the court a written inquiry reading as follows (fol. 1041):

“If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?”

This inquiry, it is submitted, plainly required the court to advise the jury concerning the precise character of the conspiracy charged in the second count, and when that conspiracy ended, and that subsequent disposition of the bonds—whether with or without knowledge that they were stolen property—was and could be no part of that previously terminated conspiracy. Instead, the court first vaguely remarked that “Of course if it occurred afterwards it would not make him guilty” (fol. 1041). Did that mean that if knowledge that the bonds had been stolen came to the defendant *after* he had aided in selling the bonds, he would not be guilty of the conspiracy charged; but that, if he possessed that knowledge *when he helped to dispose of them*, he would be guilty of the conspiracy charge, despite the fact that he had never had any part in the conspiracy until it was all over? That would certainly seem to be a natural deduction from the court’s answer to the jury’s inquiry, and it would be patently erroneous.

Nor did the court even permit the matter to remain in that vague and unsatisfactory state. It followed the remark just referred to with another instruction concerning the entirely irrelevant proposition that possession of stolen goods may give rise to a conclusion of guilty knowledge (fol. 1041), and then proceeded to aggravate the situation by winding up its additional charge with a concededly erroneous and quite misleading instruction: (fols. 1041-42). The court's final word to the jury was (*id.*):

"I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce." (Italics ours.)

"Certainly," declared the court below, in reference to this charge (fol. 1313), "it is untenable to say that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce". (See also fol. 1310 to like effect.) And no one now claims otherwise.

Immediately after hearing these final instructions, the foreman of the jury significantly remarked, "I think we will reach a verdict in a short time. \* \* \* Just about fifteen minutes" (fols. 1043). And indeed in about five minutes the jury were back with a verdict of guilty on the second count (fols. 1043-44). It is plain that they took the court's final instructions as in effect a direction by the court to convict forthwith; and they did so at once. *Malaga v. United States*, 57 F. (2d) 822, 828.

In its original opinion herein, the court below declared that the jury must have relied on this erroneous presumption which the trial judge had laid down, and therefore it ordered a new trial (fols. 1315-16). However, on being later advised by the prosecution that the defendant knew the bonds were stolen when he disposed of them, it revised the



last paragraph of its opinion and affirmed the judgment of the trial court (p. 450). It is submitted that that disposition was a mistaken one. It is just as baseless, in our opinion, to presume that a defendant has transported property in interstate commerce, when he is ignorant that it was stolen outside the state, as when he knows that it was so stolen. In one case it is clear that he may not know that the stolen goods were ever transported in interstate commerce. In the other, while he may know that such transportation occurred, it nevertheless by no means follows that he is the one who transported the property in interstate commerce. Such "a presumption that the possessor was the thief and transported stolen property in interstate commerce" (fol. 1042) means that every receiver of stolen goods is presumed first to be the thief and then further presumed to be the one who transported the goods in interstate commerce. Such a process of heaping presumptions on top of each other merely substitutes arbitrary assumption for proof and sensible inference in criminal cases.

And the error goes even deeper in the case at bar, where this jury acquitted the defendant of the substantive crime, and so found that he was not the thief and did not transport the goods in interstate commerce. Their verdict on the first count is thus at war with the "presumption" which appears to have led them to convict on the second count. Here, moreover, the jury must have carried the presumption even one step further, since they used it to sustain them in finding that the defendant was a conspirator who plotted with others to transport the stolen securities, when the proof is clear that he had no part in the illicit transactions until the bonds came to rest in New York and the conspiracy was over.

It is respectfully submitted that the additional charge of the trial judge was erroneous; that it in effect ordered the jury to convict the defendant; and that its vagueness and

confusion manifestly prevented a fair and proper disposition of the case by the jury. What the Circuit Court of Appeals overlooked in its second opinion was the devastating effect of the additional charge. The jury was disturbed about the issue of when the knowledge of the origin and character of the bonds first came to the defendant. The court's charge, however, removed all necessity for further consideration by the jury of this question. The effect of the erroneous charge was virtually to compel the jury to by-pass the issue of defendant's knowledge as it was shown by the defendant's statements (Exhibit 69, fol. 1131; Exhibit 70, fols. 1178-1179), and substitute in place thereof the erroneous presumption of guilty knowledge and illegal transportation.

#### IV

The court below erred in holding that the stolen securities had the necessary value prescribed in the controlling statute.

Section 415 of title 18 of the United States Code, the statute upon which this indictment is based, made it a crime to transport stolen securities in interstate commerce only if the securities were "of the value of \$5,000 or more." That was the form in which the statute stood when the alleged offense charged herein was committed. Manifestly this statute could have no applicability to securities whose actual value was nothing; and in the case at bar it is true, as a matter of law, that the stolen securities were quite worthless.

The bonds in question were attached to proofs of claims filed in bankruptcy (pp. 9-18). By order of court, those claims were duly allowed (p. 401). Thereafter the bonds were stolen. The allowance of a claim in bankruptcy constitutes an adjudication of the claim in the same manner as if judgment had been rendered thereon. *United States v.*

*American Surety Co.*, 56 F. (2d) 734, 736; *Lewith v. Irving Trust Co.*, 67 F. (2d) 855, 856-57. "Such an allowance has all the substantial elements of a judgment, and has the effect of a judgment" (*Lewith case, supra*). And "if there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatum*, and judgment thereon remains in full force unreversed, the original cause of action is merged and gone forever." *United States v. Leffler*, 1 Pet. 86, 100, 101; *Hamer v. New York Rys. Co.*, 244 U. S. 266, 272. Hence it is indisputable in the case at bar that when the bankruptcy court made its order allowing the claims predicated upon the bonds in question, the obligations which those bonds had previously evidenced ceased to exist and were no longer operative; the bonds thereupon became mere pieces of paper. Even in the hands of subsequent purchasers without notice, they would be worthless (N. Y. Negotiable Instruments Law, sec. 91, subd. 2; and sec. 97); they were long past due, as well as merged in judgment.

In the absence of statute to the contrary, it is the established law in the states that it is not larceny to steal ineffective, inoperative, or void instruments. *People v. Loomis*, 4 Denio (N. Y.) 380, 382. Thus, it was laid down in the *Loomis case, supra*, that:

"It is well settled that to bring a case within the purview of the latter statute, the written instrument taken by theft or robbery, must not only have been made and executed in due form and manner, but must also have remained unsatisfied and in full force, so that, when taken, it was an effective and valuable security. The instrument, although complete in form and signature, and ready to be issued or delivered according to its design, could not while in that state, be subject of robbery or larceny. Nor could such an offense be committed in regard to a security, originally valid but

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which had since been paid and satisfied, for it was no longer available for its original purpose, or of value to anyone."

So if a thief were to steal a packet containing counterfeit bills of the face value of \$10,000 and transport them in interstate commerce, it is clear that he would not violate the statute which is applicable in this case, since what he had thus transported in interstate commerce was certainly not "of the value of \$5,000, or more," as required by this act. And it would be quite immaterial, so far as this statute is concerned, that thereafter he had passed the bills off on another and had received \$10,000 therefor. That would make him guilty of a second crime, it is true, but it would not endow the worthless counterfeit with any value. These observations expose the fallacy which underlies the assertion of the court below that the stolen securities herein "had an actual value of \$5,000, as the record shows, even though it was factitious" (fol. 1303). The circumstance that the subsequent sales of the securities might have defrauded the buyers out of \$5,000 or more, could not give *value* to the stolen pieces of paper, which had once been obligations but had long before been discharged as such and had become wholly inoperative. The question was one of the value, the actual value, and not one concerning the factitious or fictitious value of the stolen property; and certainly not of the value which worthless paper may have to swindlers as instrumentalities for the accomplishment of subsequent frauds or thefts by them.

Congress itself seems to have recognized that that was the proper interpretation of sections 415 and 417 as they read when the offense at bar is charged to have been committed; for it subsequently and on August 3, 1939, amended the law, so as to make the test of the jurisdictional value no longer merely the actual value of the stolen securities,

but "the face, par, or market value, whichever is the greatest" (see sec. 417, title 18, U. S. Code as amended Aug. 3, 1939, c. 43, sec. 3, 53 Stat. 1178). "The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended, demonstrates the intent to change the preexisting law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act." *United States v. Bashaw*, 50 Fed. 749, 753-54; *United States v. Field*, 255 U. S. 257, 264-65; *Brewster v. Gage*, 280 U. S. 327, 337.

Here it should be pointed out that the court below inadvertently fell into error when it declared that, "Besides stolen 'securities', presumably valid, the statute covers 'falsely made, forged, altered or counterfeited securities'" (fol. 1302). Section 415, as it stood when the offense at bar was perpetrated, did not cover "falsely made, forged, altered or counterfeited securities." That language was added a year and a half later in August, 1939, when section 415 was amended (Act of Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178). Hence the argument of the court below, that "it can scarcely have been the purpose of Congress to exclude a security, originally valid but later merged in a claim, and yet to include securities void from their inception" (fol. 1302), is quite without basis in fact. The legislative history of the section establishes plainly that Congress had no intent to include void or inoperative securities within the prohibition of section 415 until long after the time with which alone we are concerned.

Nor does it advance the case of the prosecution to refer to the stolen securities as "altered securities," as did the court below (fol. 1303). Not only were these securities not altered, but the statute applicable herein made no reference whatever to forged or altered securities. It



was only when section 415 was amended a year and a half later (Act of Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178) that it cured that defect by including forged, altered, and counterfeit securities. Manifestly that plainly establishes that Congress did not contemplate the inclusion of void and spurious securities, when it originally proscribed the interstate transportation of stolen "securities," i. e., valid and valuable securities, alone.

It is submitted that the necessary jurisdictional value did not exist in the case at bar.

### Conclusion

For the foregoing reasons, it is respectfully submitted that the conviction of the defendant-petitioner should be reversed and the indictment dismissed.

BERNARD HERSHKOPF,

HENRY G. SINGER,

HARRY SILVER,

*Of Counsel for Defendant-Petitioner.*

## APPENDIX

### SECTION 88, Title 18, U. S. Code

(Criminal Code, section 37.) ~~Conspiring to commit offense against United States.—if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.~~

### SECTION 415, Title 18, U. S. Code—before amendment

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both.

### SECTION 415, Title 18, U. S. Code—as amended August 3, 1939

Same; transportation of stolen or feloniously taken goods, securities, or money.—Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, or whoever with unlawful or fraudulent intent shall trans-

port, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or fitted to be used in falsely making, forging, altering or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:261) or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 3, 48 Stat. 794; Aug. 3, 1939, c. 413, sec. 1, 53 Stat. 1178).

**SECTION 416, Title 18, U. S. Code—before amendment**

Same; receipt or disposal of goods, securities or money feloniously taken while a part of interstate commerce.—Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities of the value of \$500 or more which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken, shall be punished by a fine of not more than \$10,000 or by imprisonment of not more than ten years, or both. (May 22, 1934, c. 33, sec. 4, 48 Stat. 795.)

**SECTION 416, Title 18, U. S. Code—as amended August 3, 1939**

Same; receipt or disposal of goods, securities or money feloniously taken; receipts of articles used in counterfeiting. Whoever shall receive, conceal, store, barter, sell, or dispose

of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce knowing the same to have been stolen, unlawfully converted, or taken, or whoever shall receive, conceal, store, barter, sell, or dispose of any falsely made, forged, altered, or counterfeited securities, or whoever shall pledge or accept as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited, or whoever shall receive in interstate or foreign commerce, or conceal, store, barter, sell, or dispose of, any such bed piece, bed plate, roll, plate, die, seal, stone, type, or other tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States," as defined in Section 147 of the Criminal Code (U. S. C., title 18, sec. 261) (18:251) or (2) an obligation, bond, certificate, security, Treasury note, bill, promise to pay, or bank note issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288) (18:288), or by a bank or corporation of any foreign country. (May 22, 1934, c. 333, sec. 4, 48 Stat. 795; Aug. 3, 1939, c. 413, sec. 2, 53 Stat. 1178).

SECTION 417, Title 18, U. S. Code—before amendment

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or

more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof (Sections 415, 416 of this title). (May 22, 1934, c. 333, sec. 5, 48 Stat. 795).

SECTION 417, Title 18, U. S. Code.—as amended August 3, 1939.

Same; indictment for more offenses.—In the event that a defendant is charged in the same indictment with two or more violations of this Act (Sections 413 to 419 of this title), then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of section 3 and 4 hereof (Sections 415, 416 of this title), and the value of any securities referred to shall be considered to be the face, par, or market value, whichever is the greatest. (May 22, 1934, c. 333, sec. 5, 48 Stat. 795; Aug. 3, 1939, c. 413, sec. 3, 53 Stat. 1178.)

SECTION 550, Title 18, U. S. Code

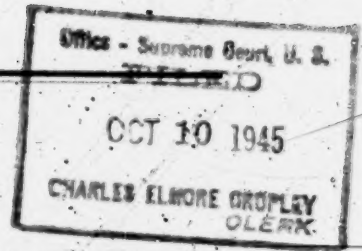
(Criminal Code, section 332). "Principals" defined.—Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

SECTION 551, Title 18, U. S. Code

(Criminal Code, Section 333). Punishment of accessories.—Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.



FILE COPY



IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 41.

CHESTER G. BOLLENBACH,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

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REPLY BRIEF ON BEHALF OF THE PETITIONER.

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✓ BERNARD HERSHKOFF,

✓ HENRY G. SINGER,

HARRY SILVER,

*Counsel for Petitioner.*

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REPLY BRIEF ON BEHALF OF THE PETITIONER.

In this brief we do not repeat what is urged in our main brief. A few matters in the Government's brief, however, require reply.

I.

THE GOVERNMENT'S BRIEF CONSTITUTES A COMPLETE CHANGE OF POSITION ON ITS PART.

The position taken by the prosecution in the court below, and in this Court on the defendant's application for a writ of certiorari, is set forth at pages 10-11 of the brief of the United States filed in opposition to the petition for certiorari. There the following appears:

*"The jury had apparently also already agreed that petitioner was not himself guilty of transporting the bonds, since their question [referring to fol. 1041: 'If the defendant were aware that the bonds which he aided in disposing of were stolen, does that knowl-*

edge make him guilty on the second (i.e., conspiracy) count?'] was directed only to the conspiracy count of the indictment. Manifestly the jury was trying to determine whether petitioner could lawfully be convicted of conspiracy *although he participated in the transaction only after the bonds were brought to New York* and they apparently interpreted the judge's instruction as authorizing a conviction on such basis . . . *That the jury did not rely upon the judge's instruction that the possession of the bonds raised an inference that the possessor had transported them and did not rely upon the testimony of the clerk of the district court [meaning the witness Chell Smith] that petitioner had been in the court house in Minneapolis, is shown by the fact that they acquitted him on the substantive count."*

Now all this (and more, as will appear below) is repudiated by the Government. Apparently realizing that the conviction of the defendant cannot stand if it be conceded, as above, that "he participated in the transaction only after the bonds were brought to New York", the Government now contends to the direct contrary. To that end, it insists that the defendant was party to the theft itself or to an initial conspiracy to steal and transport the bonds. Of course that contention flouts the verdict of the jury. Never would they have acquitted the defendant of the substantive crime, if they had believed that he stole the bonds, or caused or co-operated in the theft or transportation of the bonds. That, too, the Government conceded to be the fact heretofore: "The jury had apparently also already agreed that the petitioner was not himself guilty of transporting the bonds", the Government heretofore told this Court.

In support of its complete turnabout, the Government relies on the evidence of the witness Chell Smith that in January or February, 1937, he saw the defendant in the

Minneapolis court house. That is the self-same evidence concerning which the Government heretofore advised this Court that the jury "did not rely upon the testimony of the clerk of the district court that petitioner had been in the court house in Minneapolis."

And no reasonable juror could do otherwise than reject that evidence. The so-called identification was made over five years after the event. The defendant never was in Minneapolis. On January 31, 1937, Burns, who had been in Minneapolis a short while before and who probably had taken the bonds, already had them in New York City. The next day the defendant was in a hotel in Pennsylvania and attended a stockholders' meeting there (pp. 322-26; Ex. E, p. 400). That was February 1, 1937. At the trial of the other defendants named in this indictment, the witness Chell Smith was conceded to have stated that this defendant was in Minneapolis on February 1, 1937 (fols. 930-31). Of course that was impossible. Hence, at this trial, the witness boldly denied that that had been his prior evidence (fols. 102-4). At the other trial, he had also stated that a Miss Williams, a deputy clerk, had called his attention to the defendant on the occasion in question (fols. 112-13); on this trial, however, he declared that he "never heard of Miss Williams" (fol. 111). He claimed to have been in the room where he said he saw the defendant "five minutes or a little less" (fol. 126); yet more than five years later, he was able, not only to dissociate the defendant from the numerous callers at the clerk's office, but to give details concerning his attire (fols. 129, 133). He asserted that United States investigator Paulson was the only government agent he ever saw about this case (fol. 156). Although he stated that he was "sure that is right" (*id.*), it soon appeared he had dealings also with F. B. I. agents Milenky and Keating as well (fols. 158, 170). It is unrec-

essary to pursue the matter. The court below admitted that "the testimony of Chell Smith \* \* \* was not convincing" (fol. 1315); that "had [they] been on the jury, [they] should indeed have laid little weight upon the identification" and that "its credibility was for the jury" (fol. 1305). The verdict acquitting the defendant of the substantive crime shows plainly how the jury regarded that evidence. Just as the Government has heretofore conceded, they refused to give it any credence whatever.

Now, however, the Government virtually stakes its whole case on maintaining that the jury found Chell Smith's evidence to be true, and hence that the defendant was in the Minneapolis court house. To sustain its contentions in that respect, the Government now argues that the conviction on the second count, the conspiracy charge, effectuates that result. That contention has no support in fact or reason. It is very plain what caused the conviction herein. After long hours of deliberation, the jury had apparently agreed that the defendant had neither helped to steal nor to transport the bonds, and thereupon it inquired of the court (fol. 1041) whether "if the defendant were aware that the bonds which he aided in disposing of were stolen \* \* \* that knowledge [would] make him guilty on the second [or conspiracy] count?" The response of the trial judge manifestly led them to conclude that the answer to that question was "Yes"; for thereupon they *forthwith* reported a verdict of guilty on the conspiracy count (fol. 1044). Manifestly nothing was ~~farther~~ from the minds of the jury than that they were finding that Chell Smith's evidence (which they had already rejected) was true for any purpose, or that the defendant had had any part in the theft or transportation of the bonds. All that they meant to find was (1) that the defendant had aided in disposing of the bonds, and (2) that he was then aware that they were stolen. That is precisely



what their question to the court implies and all that it implies (fol. 1041).

This was not a compromise verdict, or any endeavor of the jury to misbehave itself and condone one offense while inconsistently convicting of another. This jury was undertaking honestly to find the facts and to obey the instructions of the court. Bearing that in mind, it is patent, we submit, that there is no room for the labored argument of the Government that the record should be perverted into finding that the defendant took part in the theft or transportation of the bonds. As the court below and the Government in its prior brief in this Court agreed, and as the final question of the jury unmistakably showed, the defendant's participation in the transaction concerned only the disposition of the bonds after their transportation to New York was over and done.

The foregoing extract from the Government's prior brief herein furthermore shows that it did not deny that the trial court fell into error, when, in answer to the jury's final question, the judge told the jury, among other things, that the possession of the bonds created a presumption that the possessor was the thief and had transported the stolen property in interstate commerce (fols. 1041-42). The Government then contented itself by claiming "that the jury did not rely upon the judge's instruction that the possession of the bonds raised an inference that the possessor had transported them." Now, however, the Government claims that the presumption was quite correct (brief, pp. 19, 58 *et seq.*). The court below admitted that that presumption was erroneous (fols. 1310, 1313). Its unreasonableness is patent; indeed, it is doubtful whether even an act of Congress could validly engraft such a presumption on our law. *Tot v. United States*, 319 U. S. 463, 467-69. Even the Government's brief (pp. 65-66) has to concede that. It declares:

"We agree that it would be unreasonable to infer merely from the fact of possession that the stolen goods had been transported in interstate commerce. Such a presumption would be as unjustified as were the statutory presumptions rejected by this Court in *Tot v. United States*, 319 U. S. 463."

The "presumption" had its effect on the jury, however. They knew that the evidence gave no countenance to the claim that the defendant had had any part in the theft or transportation of the bonds. They knew that what the defendant did related entirely to the disposition of the bonds. They therefore rightly decided to acquit him of the substantive crime. They, however, wanted additional light on the conspiracy charge. So they addressed a question to the court. Thereupon they were told about this erroneous presumption, among other things. Quite naturally they concluded that the trial judge was telling them, in response to their question, that the defendant could be convicted of conspiracy to transport stolen securities (even though he in fact had no part in their theft or transportation, and had only helped to dispose of them after the transportation was finished), because there was a rule of law affecting conspiracy cases, "a presumption" the court called it, that any possessor of stolen bonds was the thief and had transported them in interstate commerce. The tenor of the whole instruction to the jury was that that "presumption" was enough to warrant them in finding the defendant guilty on the second or conspiracy count; and the trial judge sharply cut off the attempt of defendant's counsel to clarify what the court was giving to the jury as his last word of advice (fols. 1042-43). Accordingly the jury convicted the defendant of conspiracy. Obviously, if the lower court had not led the jury into that wholly mistaken view of the crime of conspiracy, they would have acquitted

the defendant of the second charge also. Now the Government requests this Court to regard those final and fatal instructions as merely "cursory" and "nothing more" (brief, pp. 34-5).

At considerable length the trial judge had charged the jury that the defendant would be guilty of the substantive offense, if he in any way knowingly participated therein; if he transported or caused the bonds to be transported (fols. 999-1003); or if he was party "to any plan to transport the bonds" (fol. 999), or "any arrangement" or "any agreement" to that end (fol. 1001); or "entered into a scheme to . . . steal the bonds and transport them" (fol. 1002); or aided and abetted others so to do (fol. 1001). All that, the jury had determined was not the fact when it reached the conclusion that the defendant was not guilty of the substantive crime. Now, however, the Government would have this Court assume the contrary.

Where a jury finds a verdict which on its face discloses that it has set at naught the directions of the trial judge, so far as one or some counts of the indictment are concerned, there is justification in regarding what the jury has done as a compromise and an impropriety, and in refusing to extend the implications of that action to the other counts on which the jury had found the defendant guilty. That is, however, emphatically not the situation in the case at bar. Here it appears that the jury scrupulously obeyed the judge's directions. After hours of deliberation, it could not, in good conscience, find that the defendant had had anything to do with the theft and transportation of the bonds. Having, as Government itself heretofore advised this Court, "agreed that petitioner was not himself guilty of transporting the bonds," it then took up the conspiracy charge and thereupon addressed to the trial judge the question concerning that offense. On

receiving his answer to the question as to the effect of the defendant's participation in the disposal of the bonds in respect of the conspiracy charge, they believed that that instruction warranted a verdict of guilty on the conspiracy count. *That result was patently a compromise.* Never before has anyone in this Court or in the courts below charged that this jury was guilty of misbehavior, that their verdict was a compromise. Only now, for the first time, does the Government assert that; and it thus belatedly impugns the good faith of the jury because it cannot support the conviction herein, if the plain meaning and effect of the acquittal on the first count are adhered to. There is, we submit, no warrant in law for such a procedure. There is, we submit, nothing to justify the Government's contention that this defendant was a party to either the theft or the transportation of the bonds. The court below accepted that view. The Government itself agreed to it when it opposed the application for a writ of certiorari herein. Only now has it concluded to change front and argue the contrary, only now does it purport to have discovered that the jury were false to their oaths.

The suggestion that the trial court "was shocked at what he regarded as an inconsistent—evidently a compromise—verdict" (brief, p. 26), has no support in the record. The trial judge, in sentencing the defendant, did express disappointment that the verdict was not against the defendant on both counts (fol. 1045). But he was careful to add: "*I am not criticising you jurors*" (*id.*), a declaration which he would never have uttered, if he had thought, for a moment even, that the jury had betrayed their trust and rendered a shocking, inconsistent, compromise verdict.

## II.

THE GOVERNMENT'S BRIEF ABANDONS THE ONLY GROUND ON WHICH THE COURT BELOW SUSTAINED THE CONVICTION.

The Court will not fail to observe that the Government confesses that this defendant was neither tried nor convicted as an accessory after the fact; that that theory was invented by the court below; that the defendant's conviction was upheld on that theory; and that it is indefensible (brief, pp. 17, 24, 36, 47). The Circuit Court of Appeals, nevertheless, rested on that theory as the sole basis for sustaining the judgment now under review (fols. 1309-10). It may well be that, if the Government had made that concession when the motions for rehearing were before the Circuit Court of Appeals, that court would not have affirmed the conviction at all, and the defendant would be free. Probably because the confession of error comes so belatedly, this defendant still remains a convicted felon.

## III.

THE DEFENDANT'S ACTS IN DISPOSING OF THE BONDS AFTER THEY WERE TRANSPORTED TO NEW YORK CONSTITUTED NO PART OF THE CONSPIRACY CHARGED.

The statutes involved in the case at bar carefully differentiated between the transportation of stolen securities and their disposition. Section 415 of Title 18 of the United States Code, as it stood when the alleged offenses were committed, made it criminal to transport such securities in interstate commerce. It, however, said nothing about their disposition after such transportation. Section 416, as it stood when the alleged crimes were committed, did make mention of the disposition of the subject matter of the theft. It did not, however, concern itself with the disposition of



the stolen property, unless that property was stolen "while moving in or constituting a part of interstate or foreign commerce." If property was stolen while itself in interstate commerce, then, and then only, was its disposition a federal offense.

In this case, however, the indisputable facts left no room for a charge under section 416: the bonds in question were not moving in or a part of interstate commerce when they were stolen. Only after they had been stolen did they ever enter into interstate commerce.

The foregoing considerations lead to some perfectly clear conclusions: (1) Inasmuch as Congress did not even refer to the subject of disposition of stolen securities in section 415, it is plain that that section had no reference to that subject. When Congress desired to deal with that subject, it did so in unmistakable terms, as section 416 reveals. (2) Inasmuch as Congress in section 416 laid its prohibition on only one variety of disposition of stolen goods, i.e., those stolen while moving in interstate commerce, it is not permissible to assume or imply that it intended to make criminal any and every other form of disposition of stolen securities.

It is in the light of those principles that the indictment in the case at bar is to be read. Its first count charged merely the transportation of stolen securities; its second count charged merely a conspiracy to transport such securities. That is the natural reading of the indictment. It did not charge anything whatever concerning the disposition of the securities. The substantive crime had and could have no relation to the disposition of the securities. Section 415 had no relation to that; and section 415 was the section on which the first count was predicated (fol. 10). Section 416 was not involved, as the Government itself conceded in its

brief in the court below (p. 16), and only that section had to do with disposition of securities in any respect.\*

The conspiracy count is and had to be similarly limited. It alleged a conspiracy "to commit an offense against the United States, to wit, to violate Section 415, Title 18, United States Code" (fol. 12). That meant a conspiracy unlawfully to transport stolen securities, and not one to do anything else. The conspiracy had and could have no other or broader object. It certainly did not charge a conspiracy to dispose of such securities; that was not a subject embraced by the section referred to; and there was no reference even made to section 416, the only section which had anything to do with disposition of stolen securities of a very limited (and here wholly irrelevant) kind. The conspiracy before this Court, therefore, is one to transport the stolen bonds from Minneapolis to New York, and nothing more. It has no other, or different, or larger scope, object, or purpose.

In a variety of forms and at much length, the Government's brief, attempts to expand the conspiracy charge, so as to make it include, not merely the transportation which is all that it embraces, but everything concerning the disposition of the bonds which ensued after the termination of the alleged transportation. There is no warrant for that (1) in the language of the controlling statutes, or (2) in the language of the indictment itself. Here, too, the Government finds itself in conflict with the holding of the court below: Concerning the disposal of the securities after their transportation had ended, the Circuit Court of Appeals ruled (fol. 1306):

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\* "That [i.e., "receiving and disposing" of the bonds] was not the charge in the indictment", said the prosecution's brief (p. 16) in the court below.

“ . . . that was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York.”

It would serve no useful purpose to analyze in detail the numerous authorities to which the Government's brief here makes reference in this connection (p. 48 *et seq.*). They all concerned indictments which charged conspiracies broad enough to include more than mere transportation. In such cases, proof of what followed the transportation may have been within the scope of those conspiracies. But that is not so here. The indictment is limited to a conspiracy to transport; it has therefore nothing to do with any other conspiracy, like one to dispose of the matter transported. The statute itself sets apart from one another transportation and disposal; and hence the Court is not at liberty to say that they are one and the same, or that one is a part of the other. Transportation is not disposal and does not include it in this case. Other enactments and other indictments may be otherwise.

This defendant may not be convicted of a crime with which he is not charged in the indictment. It is therefore pointless to urge or intimate that he is guilty of offenses which are not charged in the indictment and which may not even be offenses against the United States. *Spies v. United States*, 317 U. S. 492, 500.

#### IV.

##### OTHER MATTERS.

The long brief of the Government contains numerous other assertions of fact and law with which we differ. We must, however, leave them unnoticed. Not only would it extend this reply to an inordinate length to deal with them,

but there is no time available for that purpose. We make mention of that, only in order that the Court may not regard our silence as acquiescence in those declarations.

CONCLUSION.

For the reasons set forth in this and in our main brief, it is submitted that the judgment of the court below is erroneous and should be reversed.

Respectfully submitted,

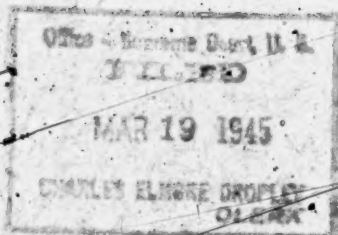
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FILE COPY



No. 996

**In the Supreme Court of the United States**

OCTOBER TERM, 1944

CHESTER G. BOLLENBACH, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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(1)

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## OPINION BELOW

The opinion of the circuit court of appeals, as amended on petition for rehearing (R. 433-439, 450), has not yet been reported.

## JURISDICTION

The decision of the circuit court of appeals affirming the judgment below upon the Government's petition for rehearing (R. 441-446) was filed January 12, 1945 (R. 450). The order denying petitioner's application for rehearing (R. 451-463) and the judgment of the circuit court of appeals were entered January 31, 1945 (R. 465-

467, 468-469). The petition for a writ of certiorari was filed February 27, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

#### QUESTIONS PRESENTED

1. Whether evidence that petitioner assisted in the sale of bonds knowing them to have been stolen and transported in interstate commerce supports his conviction for conspiracy to transport stolen bonds in interstate commerce.

2. Whether the conviction should be reversed because, in response to a question by the jury asking whether petitioner could be convicted of conspiracy if he were aware that the bonds he helped dispose of were stolen, the judge charged that recent possession of stolen property raises a presumption that the possessor stole and transported the property, the evidence having established that petitioner admitted knowing that the bonds had been stolen and transported.

3. Whether the fact that the stolen bonds had been attached to proofs of claims allowed in a bankruptcy proceeding rendered them valueless and therefore insufficient to meet the jurisdictional value requirements of the National Stolen Property Act.

### STATUTES INVOLVED

Section 3 of the National Stolen Property Act of May 22, 1934, as it read at the time of the offense involved in this case (c. 333, 48 Stat. 794, 18 U. S. C. 1934 ed. 415), provided:

Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

### STATEMENT

Petitioner and five others were indicted in the United States District Court for the Southern District of New York on two counts, one charging transportation in interstate commerce of stolen securities and the other a conspiracy to

transport or cause to be transported securities of more than \$5,000 in value known to have been stolen from the office of the United States District Court at Minneapolis, Minnesota (R. 3-6). The trial was severed as to petitioner and he was separately tried after his codefendants had either pleaded guilty or been convicted. See *United States v. Turley et al.*, 135 F. 2d 867 (C. C. A. 2), certiorari denied *sub nom Burns v. United States*, 320 U. S. 745.

The evidence for the Government may be summarized as follows:

Twenty-five gold notes attached to proofs of claim filed in bankruptcy proceedings of the Minnesota and Ontario Company were stolen from the files of the United States District Court at Minneapolis, Minnesota (R. 9, 11-13, 16-17, 19, 27-28). Burns, a codefendant previously convicted, testified at petitioner's trial that he (Burns) was in the Court House in Minneapolis in January 1937 and that he returned to New York City on January 31, 1937 (R. 313-314). Petitioner had, for a period of time prior to 1937, used Burns' New York office as a mailing address (R. 62, 69, 311). Early in February 1937, petitioner rented space at 15 E. 40th Street, New York City, under the name of Arnold Berendson (R. 105-106). On February 1, 1937, a man describing himself as Arnold Berendson attempted to dispose of ten of the stolen notes through Hart,



Smith and Co., but the transaction was not completed for the reason that Hart, Smith and Co. became suspicious of a typewritten endorsement on its check to Berendson and stopped payment on the check (R. 80-87, 92-94).

Petitioner admittedly disposed of the other fifteen stolen notes through the defendants Turley, Blaser, and Ingalls, and he received \$900 of the proceeds (R. 376-377, 393-395; see R. 207-214, 216-219, 243-247). In a statement given to an agent of the F. B. I., which petitioner signed after consultation with his counsel who was present at the time (see R. 303-304, 306), petitioner admitted that he knew that the bonds were stolen and that Burns had brought them from the West (R. 394). Petitioner had previously stolen and disposed of bonds filed in the United States District Court in Wilmington, Delaware (R. 382, 386-392).

About seven hours after the jury had retired, they reported that they were hopelessly deadlocked and the trial judge asked if any questions of law were disturbing them. In the discussion which followed, one juror asked, "Can any act of conspiracy be performed after the crime is committed?" Apparently misunderstanding the question, the judge stated that conspiracy was one of the crimes alleged. (R. 342-344.) Later the jury sent a note to the judge asking, "If the defendant were aware that the bonds which he aided in dis-

posing of were stolen does that knowledge make him guilty on the second [conspiracy] count?" (R. 347). In response, the judge instructed the jury:

Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case.

A short time later the jury returned a verdict of guilty on the conspiracy count (R. 348). Petitioner was sentenced to two years' imprisonment and to pay a fine of \$10,000 (R. 349).

Holding that possession of stolen property would not give rise to a presumption that the property had been transported in interstate commerce, the circuit court of appeals originally ruled that the judge's charge in that respect required reversal of the conviction for the reason that there was no evidence other than the testimony of one Smith, deputy clerk of the district court in Min-

neapolis, whom the court considered untrustworthy, that petitioner knew that the notes had been transported (R. 437-439). On rehearing, when the court's attention was called to the fact that petitioner had himself admitted knowing that the bonds had come from the West (R. 443), the circuit court of appeals affirmed his conviction (R. 450, 468-469).

### ARGUMENT

1. Petitioner contends (Pet. 4, 5, 9-15, 22-24) that his acquittal on the substantive count constituted a determination that he had no part in the stealing or transportation of the bonds and that he could not be convicted of a conspiracy to transport on the basis of his admitted acts in aiding in the disposition of the bonds after they had been brought to New York. The same point was raised in a somewhat different form by petitioner's co-defendant Burns on appeal and petition for certiorari to review his conviction under this indictment. Burns attacked his conviction on the conspiracy count on the ground that the overt acts charged in that count did not occur until after the notes had been brought to New York (see *United States v. Turley*, 135 F. 2d 867, 868, 870, certiorari denied *sub nom. Burns v. United States*, 320 U. S. 745. As we pointed out in opposing certiorari in that case (see Brief for the United States in Opposition, No. 156, October Term, 1943.

pp. 8-10), it is well established that a conspiracy continues until the object for which it was formed has been accomplished. Thus, in *McDonald v. United States*, 89 F. 2d 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697, McDonald's conviction for conspiracy to transport a kidnaped person was sustained although he did not join the conspiracy until several months after the victim had been released, and his activities consisted merely of exchanging unmarked money for the ransom money.<sup>1</sup> See also *Laska v. United States*, 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Skelly v. United States*, 76 F. 2d 483, 489 (C. C. A. 10), certiorari denied, 295 U. S. 757; *United States v. McGuire*, 64 F. 2d 485, 492 (C. C. A. 2), certiorari denied, 290 U. S. 645; *Loftus v. United States*, 46 F. 2d 841, 847 (C. C. A. 7); *Wilkerson v. United States*, 41 F. 2d 654, 655 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Bellande v. United States*, 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607. In the instant case the purpose of the conspiracy was not accomplished until the notes had been

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<sup>1</sup> The amendment to the federal Kidnaping Act punishing the receipt, possession, and disposal of ransom money (49 Stat. 1099) was not in effect at the time McDonald joined in the conspiracy (see 89 F. 2d at pp. 132-133, 134-135), just as in this case the amendment to the National Stolen Property Act punishing the receipt of property known to have been stolen and transported (53 Stat. 1178) was not enacted until after the commission of the acts which form the basis of this indictment.

sold and the proceeds distributed among the conspirators.

Furthermore, since the purpose of transporting the stolen notes was, unquestionably, to sell them in New York immediately, the interstate commerce continued until the notes were delivered for sale in that state. Cf. *Levi v. United States*, 71 F. 2d 353, 354 (C. C. A. 5); *Farris v. United States*, 5 F. 2d 961, 962 (C. C. A. 7). Petitioner clearly joined the conspiracy before any of the notes were delivered for sale, and he personally delivered fifteen of the notes to Blaser and Ingalls for such purpose (R. 211, 245). The evidence therefore fully supports petitioner's conviction for conspiracy to transport stolen bonds in interstate commerce, knowing them to have been stolen.<sup>3</sup>

2. Since petitioner was properly convicted of conspiracy to transport stolen bonds because of his aid in disposing of the bonds, we submit that the circuit court of appeals was correct in its ultimate decision (R. 450) that the trial judge's in-

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<sup>2</sup> *Gable v. United States*, 84 F. 2d 929 (C. C. A. 7), upon which petitioner relies (Pet. 5, 13, 14), is readily distinguishable, since there the circuit court of appeals held that there was no evidence that the defendant knew of the plan to procure bonds illegally or that he knew that the bonds had been so procured.

<sup>3</sup> Since petitioner was properly convicted of conspiracy, there is no merit in his contention (Pet. 4, 24) that his sentence should be reduced according to the provisions of the statute fixing punishment for accessories after the fact (Sec. 333 of the Criminal Code, 18 U. S. C. 551).



struction of which petitioner complains (Pet. 4, 18-22) concerning the presumption to be drawn from the possession of stolen property did not constitute reversible error. It is clear from the jury's question (*supra*, pp. 5-6) that they had already agreed that petitioner knew that the bonds had been stolen and transported. They could have reached no other conclusion in view of petitioner's direct admission of such fact (*supra*, p. 5). The jury had apparently also already agreed that petitioner was not himself guilty of transporting the bonds, since their question was directed only to the conspiracy count of the indictment. Manifestly the jury was trying to determine whether petitioner could lawfully be convicted of conspiracy although he participated in the transaction only after the bonds were brought to New York, and they apparently interpreted the judge's instruction as authorizing a conviction on such basis. Since a definite instruction to such effect would, as we have shown, have been proper, the unresponsiveness of the judge's instruction to the question asked by the jury does not, we submit, constitute a ground for reversal. That the jury did not rely upon the judge's instruction that the possession of the bonds raised an inference that the possessor had transported them and did not rely upon the testimony of the clerk of the district court that petitioner had been in the court house in Minneapolis, is shown by the

fact that they acquitted him on the substantive count.

3. The argument (Pet. 4, 15-17) that the stolen notes were not of the value of \$5,000 or more for the reason that they had merged in the claims allowed in the bankruptcy proceeding is specious. The fact is, as shown by the evidence, that the bonds had a sale value in excess of \$5,000, for fifteen of the twenty-five bonds were sold for \$4,050 (R. 213).

#### CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

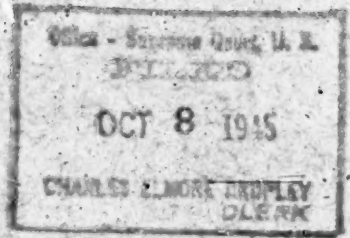
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MARCH 1945.

FILE COPY



No. 41

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*In the Supreme Court of the United States*

OCTOBER TERM, 1945

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CHESTER G. BOLLENBACH, PETITIONER

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BRIEF FOR THE UNITED STATES

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

## OPINION BELOW

The opinion of the circuit court of appeals, as amended on petition for rehearing (R. 433-439, 450), is reported at 147 F. 2d 199.

## JURISDICTION

The decision of the circuit court of appeals affirming the judgment below upon the Government's petition for rehearing (R. 440-446) was filed January 12, 1945 (R. 450). The order denying petitioner's application for rehearing (R. 451-464) and the judgment of the circuit court of appeals were entered January 31, 1945 (R. 465-467, 468-469). The petition for a writ of certiorari

was filed February 27, 1945, and was granted April 2, 1945. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

#### QUESTIONS PRESENTED

1. (a) Whether the evidence established that petitioner was a party to an initial conspiracy to transport or cause to be transported stolen property in interstate commerce, that being the only theory upon which the conspiracy count was submitted to the jury;

(b) Whether, on this theory, the overt acts were timely and were done "to effect the object of the conspiracy," as the conspiracy statute requires.

2. Whether it was error, in view of the evidence and the issues submitted for jury consideration, to charge the jury that the unexplained possession of stolen property shortly after the theft raises a presumption that the possessor is the thief and transported the stolen property in interstate commerce.

3. Whether, within the meaning of the substantive statute, the stolen property had a value of \$5,000 or more.

#### STATUTES INVOLVED

The pertinent provisions of the National Stolen Property Act of May 22, 1934, as they read at the time of the offense involved in this case (c. 333, 48

Stat. 794-795, 18 U. S. C. 1934 ed. 414-415), are as follows:

Section 2. That when used in this Act—

(a) The term "interstate or foreign commerce" shall mean transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

(b) The term "securities" shall include any note, stock certificate, bond, debenture, \* \* \* or any forged, counterfeited, or spurious representation of any of the foregoing.

\* \* \* \* \*

SECTION 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than ten years, or both.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in



any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

#### STATEMENT

Petitioner, together with George A. Turley, Peter W. Burns, Herbert G. Jacobson, Fred Blaser and Ernest D. Ingalls, were indicted in the United States District Court for the Southern District of New York in two counts charging a violation of Section 3 of the National Stolen Property Act and a conspiracy to commit that offense. The substantive count alleged that the defendants between January 1, 1937, and February 8, 1937, the exact date being unknown, transported and caused to be transported from Minneapolis, Minnesota, to New York City twenty-five Minnesota & Ontario Paper Company \$1,000 gold notes of the value of \$5,000 or more, which had been stolen from the office of the clerk of the United States District Court in Minneapolis, and that the defendants knew the notes had been stolen. The conspiracy count charged the defendants with conspiring to commit the offense from January 1, 1937, to January 1, 1938; five overt acts committed by the defendants in February, 1937, pursuant to the conspiracy and to effect its objects, were set forth (R. 3-6). The trial was severed as to petitioner, and he was tried after his codefendants had either pleaded guilty

or had been convicted. See *United States v. Turlay, et al.*, 135 F. 2d 867 (C. C. A. 2), certiorari denied, *sub nom. Burns v. United States*, 320 U. S. 745.<sup>1</sup> Petitioner was acquitted on the substantive count and convicted on the conspiracy count (R. 348). He was sentenced to imprisonment for two years and to pay a fine of \$10,000 (R. 349, 403). On appeal to the Circuit Court of Appeals for the Second Circuit, that court originally reversed the judgment of conviction, holding that the charge of the trial judge in respect of a presumption arising from the possession of stolen property, was, on the basis of the evidence, which it considered, prejudicial error (R. 433-439). However, on the Government's petition for rehearing, calling attention to other evidence in the case and to a concession in petitioner's brief in that court based upon such evidence (R. 443-444), the court ruled that the error was not prejudicial, and, accordingly, affirmed the judgment (R. 450, 468-469).

Viewed in the light most favorable to the Government,<sup>2</sup> the evidence may be thus summarized:

Since 1931 petitioner had been engaged in the study of corporations in the process of reorganization (Gov. Ex. 69, R. 372-373).<sup>3</sup> Since 1932

<sup>1</sup> Blaser and Ingalls pleaded guilty (R. 199, 245).

<sup>2</sup> *Glasser v. United States*, 315 U. S. 60, 80.

<sup>3</sup> Gov. Ex. 69, R. 304, 371-385, and Gov. Ex. 70, R. 304, 385-398, are written statements made by petitioner to a Federal Bureau of Investigation agent after his arrest. Petitioner gave these statements after consulting his attorney (R. 303-304, 306, 386).

defendant Burns had been in the business of selling lists of stockholders and bondholders. He had an office at 15 William Street, New York City (R. 312). Petitioner and Burns had known each other since 1921. Since 1932 petitioner had used Burns' office for receiving mail (R. 311-312; Gov. Ex. 69, R. 373). Their relations were exceedingly close; as characterized by petitioner, "it would be nothing on my part or his part to come to me with any kind of a deal" (Gov. Ex. 70, R. 392). According to his statement to the F. B. I., petitioner admitted that in 1935 he stole twenty bonds of a corporation in reorganization from the files of a state court in Delaware; he said that Burns aided him in the disposition of these bonds with knowledge that they had been stolen by him; the two shared the proceeds (Gov. Ex. 70, R. 381-382, 386-392). In this transaction petitioner, in order to secure access to the court files, represented that he was one Johnson, connected with defendant Turley, an attorney in New York City whom petitioner knew and who was interested in receiverships (R. 251, 253, 260-262; Gov. Ex. 69, R. 384). The bonds were sold through a brokerage firm in New York City by an individual posing as T. R. Johnson of 246 Fifth Avenue, New York City. Negotiations were conducted wholly by telephone by petitioner or Burns. At the same time space was rented at 246 Fifth Avenue in the name of "Johnson". An employee of Turley admitted that he signed the broker-

age account card and the written endorsements on the checks subsequently issued by the brokerage firm. In this transaction, in addition to the endorsement "T. R. Johnson", the additional endorsement by typewriter, "pay to the order of National Safety Bank & Trust Company, Robert C. Wilson", was put on the checks. The employee of Turley who wrote on the checks the endorsement "T. R. Johnson", testified that he did not know who put the typewritten endorsements on the check (R. 288-290, 293-296, 300; Gov. Ex. 17, R. 128, 354; Gov. Ex. 19, R. 129, 354; Gov. Ex. 66, R. 293, 296; Gov. Ex. 70, R. 389). Between 1935 and until subsequent to February, 1937, petitioner was in Turley's office "quite often" (R. 251). Burns first visited Turley's office in the latter part of 1935 (R. 251, 295). In 1936 Turley became actively associated with defendants Blaser and Ingalls, who operated an over-the-counter securities firm in New York City, and after January 1, 1937, he became the firm's financial backer (R. 201-205).

In January, 1937, there was pending in the United States District Court for the District of Minnesota, Fourth Division, located at Minneapolis, Minnesota, a proceeding for the reorganization of the Minnesota & Ontario Paper Company (R. 14-16, Gov. Ex. 4, R. 16, 350). Holders of the company's six percent \$1,000 gold notes had filed proofs of claim, to which were attached the original notes (R. 9, 11-13, 15, 27-28). The notes were

due March 1, 1931, and the claims were allowed as of January 21, 1935 (Defendant's Ex. F, R. 326, 401).

In April, 1937, the chief deputy clerk discovered that twenty-five of the notes, together with the proofs of claim, had been stolen from the files in the office (R. 16-19, 60). Burns admitted at petitioner's trial that he had been at the clerk's office three or four times in January, 1937, and had there inspected various dockets and papers. He "used to go there around lunch time when people I was calling on would be out to lunch" (R. 312-313). A deputy clerk of the court, one Chell Smith, testified that during the latter part of January or the first part of February, 1937, he had seen a man inspecting the Minnesota & Ontario files. This man he identified as petitioner. He also stated that he had never seen Burns at the clerk's office (R. 29-33, 34-36, 40-42, 44-45, 47, 59, 310-311). Turley's secretary testified that in the early part of 1937 Turley received long distance calls from petitioner and Burns (R. 252-253). The secretary in Burns' office, which petitioner used, testified that in January, 1937, petitioner was in and out of town (R. 61, 78-79).

On January 31 or February 1, 1937, Hart Smith & Company, a New York brokerage house handling over-the-counter transactions in the securities of paper companies, and specializing in the gold notes of the Minnesota & Ontario Paper Company, received a telephone call



from a man who gave his name as Arnold Berendson, inquiring as to the quotation for these notes. Following telephone conversations on the two succeeding days, in which Berendson advised that he was interested in "liquidating possibly \$25,000 worth" and was told that the market could better absorb \$10,000 on the first day and the balance of \$15,000 in a day or so, it was agreed that the brokerage house should first dispose of only \$10,000 worth of the notes. On February 3 a messenger brought ten of the stolen notes to the brokerage house in an envelope bearing the name of Arnold Berendson, 10 East 40th Street, New York City, and a check was issued for \$2,500, the market price. After a confirmation of the transaction was returned marked "Addressee Unknown", Berendson advised the brokers by telephone that his correct address was 15 East 40th Street. A telephone call by the brokers to that address was answered by a man named Tryon, who stated that he did not know anyone by the name of Berendson (R. 12, 17-18, 80-87, 92-93, Gov. Ex. 6, R. 84, 351; Gov. Exs. 7, 8, R. 91, 93, 351). There was, however, evidence that Tryon did rent office space to Berendson at 15 East 40th Street in the early part of February, 1937, and Tryon's daughter, one of the occupants of the suite, identified petitioner as Berendson (R. 105-106, 108-114, 310-311). Burns was also seen at Berendson's office several times during this period by the same

witness (R. 105, 113). After the sale, Hart Smith & Company checked the references which Berendson had previously given them, and when the references indicated that they did not know Berendson, the firm stopped payment of the check it had issued to him (R. 82, 86-87, 93-94).

On February 6, 1937, petitioner and his codefendants Turley, Burns and Jacobson, met at a luncheon in a restaurant in New York City (R. 156-157, 240-242). What occurred at the luncheon was testified to by Jacobson. Jacobson had known Turley and Burns since 1936. He had at times used the facilities of Turley's office. (R. 154, 252). He came to the luncheon after a telephone call from and a meeting with Turley, at which Turley told him that he would "meet a couple of men \* \* \* and discuss a certain situation" (R. 155-156, 158). The subject discussed at the luncheon was how to get back the notes or cash the Hart Smith check which Berendson had deposited in his account in the National Safety Bank & Trust Company (R. 157, 164). Turley said that Burns and petitioner "had made a deal up-State where they had taken stock securities in exchange for other securities;" that the securities were brought to New York and sold to brokers and the brokers had issued a check (R.

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\* Jacobson was uncertain whether he was told who the Berendson was who opened the account (R. 157, 165, 168, 173-174, 177).

157, 159-160). The trouble appeared to be that the bank would not honor the broker's check because it had been endorsed in typewriting (R. 160-161, Gov. Ex. 7, R. 251). The reason why they needed Jacobson's assistance was that "one gentleman had been in some difficulty with the Securities Office at a prior time, and for that reason the receipt for the securities was given in the name of Berendson, and that was the reason they did not want to appear at the bank" (R. 165). Jacobson said that he was with Manning & Company, and that he would ask Captain Manning to help them (R. 164).

Later in the day Burns went to Manning's office, where Jacobson introduced him to Captain Manning under the name of Berendson (R. 167, 168-169). Burns had with him three letters signed by Berendson and dated February 6, 1937 (R. 167; Gov. Exs. 12, 27, 32, R. 96, 138, 147, 352, 357, 360). One letter was addressed to Manning & Company and requested that it should sell the ten notes for Berendson's account; enclosed was an order on Hart Smith & Company for the notes "against check for \$2,500" (Gov. Ex. 32, R. 147, 360); the second was a letter to Hart Smith & Company, informing them that Manning & Company had taken over the account and instructing them to deliver the notes to Manning & Company "against check for \$2,500" (Gov. Ex. 12, R. 96, 352); the third letter was to

the National Safety Bank & Trust Company, instructing it to deliver the Hart Smith check to "bearer" (Gov. Ex. 27, R. 138, 357). Jacobson delivered the letter to Hart Smith; Manning had the letter to the bank delivered. However, they were unable to accomplish their purpose (R. 96, 137-138, 149, 170).

On February 9, 1937, Berendson wrote to the bank that Manning & Company had informed him that the bank had refused to turn over the Hart Smith check "owing to the fact that the endorsement contained thereon was typed"; the letter further stated that, "This letter will act as my endorsement on said check and you are authorized to deposit the same to my account. I am sending Manning & Company a copy of this letter, together with check on my account with your bank for the sum of \$2,500" (Gov. Ex. 28, R. 138, 358). On February 10, 1937, Berendson from Philadelphia, Pennsylvania, sent the check and a copy of the letter to Manning (Gov. Exs. 31, 33, 34, R. 142, 149-150, 359, 360-361). Manning had them delivered to the bank, which, however, refused to honor the check (R. 150-151). Manning then told Jacobson what had occurred, and said that Jacobson should retain an attorney to handle the matter (R. 151).

Jacobson spoke to Turley, and then received \$50 from Burns for the purpose of retaining a lawyer to secure the return of the notes or the check (R. 170-172). Jacobson spoke to a lawyer

about the matter and told him that Berendson was in Chicago (R. 172-173, 197, 198). This lawyer prepared assignments to Manning & Company of the claims Berendson was asserted to have against Hart Smith and the bank, and told Jacobson to have them executed by Berendson (R. 198-199, Gov. Ex. 41, R. 175, 361). Jacobson gave the assignments to either Burns or Turley (R. 175). About a week later Jacobson informed the lawyer that he was unable to secure the execution of the assignments and said that "There is nothing further to be done about it" (R. 199).

The other fifteen stolen notes were sold on February 11, 1937, through defendants Blaser and Ingalls to A. E. Ames & Company for \$4,050 (R. 12, 17-18, 212-213, Gov. Ex. 50, R. 214, 364). Blaser and Ingalls met petitioner at Turley's office about February 5, 1937. Turley introduced petitioner under the name of Brown, and said that petitioner had a "proposition" for them. Petitioner stated that he had fifteen notes for disposal at a "good commission", and also that he wanted to cash a \$2,500 check, which represented the proceeds of ten Minnesota and Ontario Paper Company notes—"the damn fool had endorsed it with a typewriter" (R. 206-207, 234-235, 243-244). After petitioner left the office, Turley told Blaser and Ingalls "to keep [their] hands off" the check, and to dispose of the notes "according to Street practice"; that there might be an in-



vestigation (R. 209-210, 216, 244). Two days later petitioner appeared at the office of Blaser and Ingalls, where he delivered the fifteen notes and a letter from one Walter T. Roberts on the letter-head of the Hotel New Yorker, instructing Blaser and Ingalls to sell the notes (R. 211-212, 245; Gov. Ex. 48, R. 212, 364). After Blaser and Ingalls sold the notes, they sent a confirmation to Roberts at the Hotel New Yorker (R. 214).

When Blaser and Ingalls received the purchaser's check, they deposited it in the firm's bank account (R. 217). Pursuant to Turley's instructions, Ingalls made out a check for \$3,937.50, payable to Roberts, and this was delivered to Turley (R. 216-218, 246; Gov. Ex. 53, R. 219, 365). The next day petitioner went to the office of Blaser and Ingalls with the check, which then had on it the endorsement "Walter T. Roberts" (R. 217, 246). Blaser went to the bank with petitioner, had the endorsement guaranteed, and the check was cashed; petitioner gave the money to Blaser (R. 236). Ingalls took the money up to Turley's office, where he saw Burns waiting outside. In the office he met petitioner and Turley, and handed over the money to Turley. Turley gave Ingalls some of the money and kept some of it for himself. The rest he put in a pile on his desk. As he did this, Burns walked in and took the money

on the desk, whereupon petitioner protested (R. 246-247). Turley then gave petitioner \$1,000 or \$1,100, of which petitioner "kicked back" to Turley some \$100 to \$200, because Turley said that Blaser and Ingalls would need an attorney to defend them (Gov. Ex. 69, R. 377-378, 397).

In April, 1937, the purchaser of the notes told Blaser that they had been stolen, a matter which Blaser and Ingalls brought to Turley's attention (R. 221). Turley stated to them that the bonds had been stolen by that "Long Drink of Water," meaning Burns (R. 227, 248).

According to petitioner's statements to the F. B. I., Burns told petitioner in January, 1937, that he was in possession of \$15,000 worth of Minnesota and Ontario Paper Company bonds which he desired petitioner to help dispose of; that petitioner suggested that the bonds could be sold through Turley (Gov. Ex. 69, R. 374); that Burns stated to petitioner that he had obtained the bonds "out West" (Gov. Ex. 69, R. 375); that when the matter of the disposal of the bonds was broached to Turley, either Burns or he told Turley that Burns had stolen the bonds "from the West" (Gov. Ex. 70, R. 394; see also same Exhibit, R. 393). In other respects, the details given in the statements of the transaction pursuant to which the fifteen notes were disposed of do not differ in material respects from those heretofore recited.

Petitioner did not take the stand. The only witnesses produced on his behalf were Burns and petitioner's brother and wife. Burns testified that he was in the clerk's office at Minneapolis on several occasions in January, 1937; that he was in Minneapolis at least two weeks; that he came back to New York on a Sunday, which was either January 30 or 31;<sup>5</sup> that petitioner was not in Minneapolis to Burns' knowledge; that he had not told petitioner that he was going to Minneapolis, and prior to or during the trip had not discussed Minnesota and Ontario bonds with petitioner; and that his first contact with petitioner after the trip was a week or two later. Burns, in questioning by the court, denied that he took the notes from the clerk's office in Minneapolis. Despite the fact that his attention was called to the statements by petitioner to the F. B. I. and also the testimony of Jacobson, Burns denied that he had disposed of the twenty bonds which petitioner had stolen in Delaware in 1935 or that he, petitioner, Turley and Jacobson had had any meeting at a restaurant in New York City (R. 312-315, 316-317, 319, 320; cf. *supra*, pp. 6, 10-11). Refreshing his recollection by a letter which petitioner had written his wife, petitioner's brother testified that on February 1 and 2, 1937, he and petitioner were in Shamokin, Pennsylvania, and returned to New York directly from that city (R. 322-324; Defendant's Ex. E, R.

<sup>5</sup> At one point he stated the date to be February 1 (R. 317).

400) Petitioner's wife testified that she had received a letter petitioner had sent her from Shamokin and that she had no recollection of petitioner having been away from home in January, 1937 (R. 325-326).<sup>a</sup>

#### SUMMARY OF ARGUMENT

##### I

The case was submitted to the jury on one theory alone, namely, that petitioner was a party to an initial conspiracy to transport the stolen notes in interstate commerce or to cause them so to be transported, and not, as the circuit court of appeals supposed, also on the theory that petitioner could be convicted, under accessory after the fact principles, if he joined a conspiracy to dispose of the notes after the transportation had ended. On the theory on which the case was presented to the jury the evidence made out a strong circumstantial showing linking petitioner, Burns and Turley, or at least petitioner and Burns, in a conspiracy to transport or cause the stolen notes to be transported from Minneapolis to New York for the purpose of there selling them.

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<sup>a</sup> The facts relating to the theory upon which the case was submitted to the jury in respect of the conspiracy count as well as those bearing upon the alleged error in one of the trial judge's supplemental charges as to a presumption arising from the possession of stolen property are recited in those portions of the brief dealing with the subjects.

Although the overt acts were laid after the notes had reached New York they were timely and were done "to effect the object of the conspiracy," as required by the conspiracy statute. There is substantial authority to the effect that a conspiracy may endure beyond the commission of the substantive offense until the conspirators have attained their ultimate object, whatever that may be. The purpose of the conspirators in this case was not merely to bring the stolen notes to New York; their ultimate aim was to sell the notes and share the proceeds. The overt acts were relevant to the accomplishment of this aim, and it is therefore immaterial when the stolen notes ceased to be in interstate commerce.

Even if, however, there be accepted another line of authorities to the effect that the object of the conspiracy is limited to the commission of the substantive offense and that the conspiracy dies with the commission of that offense, all of the overt acts, except one, are unassailable. The purpose of the interstate transportation of the securities was to place them in the hands of purchasers in New York; the interstate transportation consequently continued until that occurred. The temporary interruption in the interstate movement of the securities for the period required to contact purchasers did not break the continuity of that movement. In fact, the conspirators themselves continued the interstate movement when they carried the securities to the purchasers. All of the overt acts



charged were submitted and proved and all except one related to the disposal of the notes, the event which marked the end of the securities' interstate journey. These overt acts hence not only were timely but furthered the object of the conspiracy since they concerned "the final step in the use of interstate transportation". See *Brooks v. United States*, 267 U. S. 432, 439.

## II

It was not error for the trial judge to charge the jury that the recent unexplained possession of stolen property in another state than that in which it was stolen raises a presumption that the possessor was the thief and transported the stolen property in interstate commerce. The presumption was utilized not in a case where, as petitioner and apparently also the circuit court of appeals assume, the possessor was merely a receiver or disposer of stolen property, in which it would undoubtedly have been inappropriate, but in a case where, the evidence permitting, the questions submitted to the jury for determination were whether petitioner had himself transported the stolen securities in interstate commerce or caused them to be so transported, and whether he was a party to an initial conspiracy to accomplish the transportation. The presumption was relevant to the determination of these questions.

The presumption is a rational one. It has consistently been held in cases involving prosecutions

for larceny that the recent unexplained possession of stolen goods gives rise to a presumption that the possessor is the thief and is consequently also the asporter of the stolen property. The presumption is certainly not stretched beyond reason when, as applied to federal statutes, aimed at thievery but necessarily limited, for jurisdictional purposes, to the offense of the transportation interstate of the stolen property, it is assumed also that the thief has brought the property from the state in which it was stolen to the state in which it is found in his possession. If it is not unreasonable to assume that the possessor of the stolen goods was the thief, it is no less reasonable to assume that he took them from the place where they were stolen to the place where they were found in his possession.

### III

It is clear that, as the circuit court of appeals held, the notes satisfied the statutory requirement that the stolen property have a value of \$5,000 or more. The notes had a face value of \$25,000 and they were sold on an open active market for \$6,500 shortly after their transportation. Petitioner's argument that the statute covered only the transportation of stolen securities valid when stolen, and that the notes were invalid at the time of their theft because they had been allegedly merged in the claims filed by the noteholders in the reorganization of the issuing corporation, is

plainly without merit. At no time has the statute been confined to the transportation of securities valid when stolen. But, in any event, it is manifest that the mere allowance of claims in a corporate reorganization proceeding does not invalidate or make valueless the securities representing the claims, as is evidenced by the constant trading in the securities of corporations undergoing reorganization, a fact recognized in the Bankruptcy Act itself.

### ARGUMENT

#### I

AS TO THE CONSPIRACY COUNT, THE CASE WAS SUBMITTED TO THE JURY SOLELY ON THE ISSUE WHETHER PETITIONER WAS A PARTY TO AN INITIAL CONSPIRACY TO TRANSPORT THE STOLEN SECURITIES IN INTERSTATE COMMERCE OR TO CAUSE THEM SO TO BE TRANSPORTED. HIS CONVICTION ON THAT BASIS WAS PROPER.

In the circuit court of appeals petitioner contended "that the evidence did not support the verdict—especially because the transportation had ended before [he] became connected with it—" (R. 434). This contention, the court pointed out, turned upon the supposed incredibility of the testimony of Chell Smith, the deputy court clerk who identified petitioner as having been in the clerk's office in Minnesota before the theft. The court ruled, however, that while, if it had been on the jury, it would have given little weight to Smith's

identification of petitioner,<sup>7</sup> "clearly its credibility was for the jury and we may not intervene." It added that "The fact that the overt acts were all laid at a time after the transportation of the notes had ended in New York presupposes that the accused could not be convicted of a conspiracy which he only joined thereafter" (R. 435).<sup>8</sup>

Further, the court assumed that the trial judge, by one of his supplemental instructions, advised the jury that "although the accused would not be guilty of conspiracy if he only learned that the notes were stolen after he had disposed of them, he would be guilty, if he learned it before."<sup>9</sup> And the court said "That implied that he could be guilty of a conspiracy to transport stolen notes, if he

<sup>7</sup> It emphasized this later in another connection when it characterized Smith's testimony as unconvincing and stated that there was every probability that the jury did not believe Smith's testimony, "for, if they had, they would scarcely have brought in a verdict of acquittal on the first count" (R. 439).

<sup>8</sup> The court took up at a later point the fact that the overt acts were laid after the transportation of the notes had ended in New York (R. 437).

<sup>9</sup> The supplemental instruction in question, so far as pertinent at this point, was as follows (R. 347):

"I have this note from the jury: 'If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?'

"Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. \* \* \*

joined in their disposal after the transportation had ended." With reference to this alternative basis on which the court deemed the case to have been submitted to the jury, the court ruled that while, strictly speaking, the disposal of the notes was not any part of the crime for which petitioner was indicted, the substantive crime and also the conspiracy to commit it having ended when the notes came to rest in New York, nevertheless "to help dispose of them was to become an accessory after the fact, and that was also a crime (§ 551, Title 18, U. S. C.). It was therefore also a crime to join a conspiracy to dispose of them; and for that crime the conspirators joining after the transportation was over might be indicted as principals. *Skelly v. United States*, 76 Fed. (2) 483 (C. C. A. 10)." On the same basis the court ruled that there was no merit in the objection that the overt acts were all laid after the notes had come to New York (R. 436-437).

Despite the holding of the circuit court of appeals that Smith's testimony was sufficient, as a matter of law, to support a finding that petitioner was a participant in a conspiracy antedating the theft and transportation of the notes, the question of the credibility of that testimony being for the jury, petitioner argues the case here as though Smith's testimony must be wholly rejected and as though the evidence established



beyond question that his only connection with the stolen notes was that he helped to dispose of some of them after they reached New York. In this connection he cites his acquittal by the jury upon the substantive count (Br. 3, 6, 10, 13, 16-17). He then proceeds to argue that the circuit court of appeals was in error in holding that he could be convicted for conspiring to join in the disposal of the notes on accessory after the fact principles since he was not indicted and tried for that offense but only for a conspiracy to transport or cause the stolen notes to be transported in interstate commerce. He also advances other reasons in support of his contention (Br. 8-19).

We think that the state of the record requires us to take the following position: We believe that upon the record, properly interpreted, as we shall attempt to demonstrate, the case was submitted to the jury on one issue alone, namely, whether petitioner was a party to an initial conspiracy to transport the stolen notes from Minnesota to New York; that it was not submitted on an alternative theory that petitioner could be convicted, on an accessory after the fact basis, if he joined a conspiracy to dispose of the notes after they reached New York. We hence do not feel that we can support the conviction on the accessory after the fact basis, and consequently do not argue the point. We therefore address

ourselves to the merits of the questions whether there was sufficient substantial evidence to justify the submission of the case to the jury on the actual issue presented and whether the overt acts, in this aspect, were timely and done, as required by the conspiracy statute "to effect the object of the conspiracy."

#### A. THE ISSUE SUBMITTED TO THE JURY

The view of the court below that the trial judge permitted the jury to convict petitioner upon the conspiracy count not only if it found that he was a party to an initial conspiracy to transport or cause the stolen notes to be transported from Minnesota to New York, but also if it found alternatively that he joined a conspiracy to dispose of the notes after they reached New York, was predicated upon a single isolated sentence in the trial judge's final supplemental instruction to the jury (R. 436-437).<sup>10</sup>

When the record is considered as a whole there is, we believe, no basis for the view that the case was sent to the jury on the alternative theory. In sentencing petitioner the trial judge stated (R. 349):

Well, it is unfortunate that I cannot give this defendant an adequate sentence. *There is no question about his guilt on both counts.* The record in this case indicates

<sup>10</sup> The court below refers to the sentence in the instruction copied in footnote 2, at p. 22, *supra*.

this man is an old offender and it is the stealing of the bonds from a court which makes it so serious. The most I can give this man is two years. I am not criticising you jurors, but I will say that if your verdict had been guilty on the first count, as I think it should have been, I could have given this man what I want to give him. [Italics supplied.]<sup>11</sup>

It is quite evident therefore that the trial judge, we think rightly, viewed the evidence as disclosing beyond question that petitioner was implicated in the criminal enterprise from the beginning and that he could not understand how the jury could convict petitioner of being a party to a conspiracy to transport or cause the stolen notes to be transported in interstate commerce and at the same time acquit him of the charge that he at least caused the stolen notes to be so transported; that the judge was shocked at what he regarded as an inconsistent—evidently a compromise—verdict.<sup>12</sup> It seems only reasonable to assume, there-

<sup>11</sup> Petitioner could have been given a term of imprisonment for ten years on the substantive count. He thus could have been given a maximum term of imprisonment of twelve years on both counts, if he had been convicted on both, rather than merely two years on the conspiracy count.

<sup>12</sup> Since consistency in the verdict is not required (*Dunn v. United States*, 284 U. S. 390), the validity of petitioner's conviction on the conspiracy count must be tested on its own merits and irrespective of his acquittal on the substantive count. If speculation were permitted as to why the jury freed petitioner on the substantive count, it may have felt that the evidence did not sufficiently disclose whether Burns or petitioner stole and transported the notes.

forè, that the trial judge framed his charge and supplemental instructions in the light of his view that the jury would be unjustified in holding that petitioner had not participated in the criminal venture *ab initio*.

In his principal charge the trial judge devoted himself in the greatest detail to the substantive offense, contenting himself with an exposition, in more general terms, of the principles of conspiracy law. It is in connection with his advice to the jury as to the part petitioner must have played in order to be convicted of the substantive offense that the jury was to take its guide in determining whether he was guilty on the conspiracy count. There can be no doubt that the jury was told that it could find petitioner guilty of the substantive offense only if it found that he was an initial participant in the crime; that he must be acquitted if it determined that his participation did not occur until after the notes arrived in New York. The substantive offense had ended, according to the trial judge's understanding, when the notes reached New York. Thus, the trial judge stated (R. 334): "Now if it appears to your satisfaction that the defendant had nothing to do with transporting the stolen bonds, or causing them to be transported, and his dealings with the bonds [were] only after they were transported, that would not be a crime, and your verdict in that event would be not guilty. If you find that

the defendant transported these bonds or participated in it by having somebody else do it, knowing them to be stolen, \* \* \*, and they were transported from one state to another, the crime would be complete." Other excerpts to the same effect appear in the footnote.<sup>13</sup>

<sup>13</sup> "So you must, so far as the first count is concerned, determine whether the Government has established beyond a reasonable doubt that the defendant either stole the bonds, or knowing that they were stolen, transported the bonds himself, or was a party to a plan to transport the bonds from Minneapolis to New York in interstate commerce." (R. 333.)

While the trial judge refers to the aider and abettor statute, it is quite evident that he does so in connection with aiding, with knowledge, in the transportation process at the beginning, for he immediately says:

"If you believe that he neither transported nor caused to be transported these bonds, why he is not guilty. If you believe he did not enter into any arrangement to do that or any agreement, you will find him not guilty. On the other hand, if you believe that this defendant entered into a scheme to either steal the bonds and transport them, or if somebody else stole them and he didn't, but somebody else did with his knowledge and consent, and either transported them or caused them to be transported, he would be guilty. If he did not he would not be guilty." (R. 334.)

"If the participation of this defendant in this was subsequent, that is, that he did not know that they were transported, that is, if he did not transport them or cause them to be transported himself, of course there would be no offense. That is, if the bonds arrived in New York and he had nothing to do with transporting or causing them to be transported there, would be no offense. On the other hand, if he knew these bonds were stolen by himself or somebody else, and whether he transported them himself or somebody else transported them, with his knowledge and consent, he would be guilty of a crime." (R. 334-335.)



When the trial judge dealt with the conspiracy count he did not again define the offense petitioner must have conspired to commit except in the most general terms (R. 329-331, 332, 333, 335-340); but, in view of his detailed instructions with reference to the substantive count, it is beyond question that the jury was informed that it could not convict petitioner on the conspiracy count if he participated only in the disposal of the notes after they reached New York; that it must find that he was a party to an initial conspiracy to transport or cause the stolen notes to be transported from Minneapolis to New York. And there is nothing which transpired later which, in our opinion, can reasonably be construed as allowing a conviction on any other basis.

After the jury had been out for seven hours, <sup>12</sup>excluding two intermissions, one for dinner (R. 342), they returned to the courtroom and reported that they were deadlocked (R. 342-343). During the interchange which followed <sup>14</sup>one of the jurors asked the question: "Can any act of conspiracy be performed after the crime is committed?", to which the trial judge replied: "That is one of the crimes alleged, the conspiracy. Con-

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<sup>14</sup> In the course of this interchange the court added to its original charge an instruction to the effect that if petitioner's possession of the stolen notes was recent and unexplained, there arose a presumption that he knew the notes were stolen (R. 343-344), a presumption which the court below recognized to be well-settled law (R. 437-438).

spiracy is one crime alleged and the other is bringing in or causing to be brought in in interstate commerce the stolen bonds." (R. 344). This may not have been a direct answer to the juror's question, as the court below states (R. 436) but, in view of what subsequently transpired, it would seem that the trial judge thought the jury understood him to mean that a conspiracy could not follow the commission of the offense which was the object of the conspiracy.<sup>15</sup> Shortly afterwards the jury retired but returned to the courtroom in twenty minutes (R. 345). In the presence of the jury counsel for petitioner stated: "I further except to your Honor's failure to instruct in response to one of the jurors. I understood the question was whether or not a conspiracy could be committed where the object of the conspiracy had already been completed." To this the judge replied: "I had already told the jury that could not be." Counsel for petitioner then added: "I think in response to the juror's question your Honor instructed them something about overt acts",<sup>16</sup> and the judge replied: "I had already explained that in the charge, that if the crime ended that was the end of it" (R. 347). The court below states that the trial judge mistakenly replied to counsel's exception that he had already told the

<sup>15</sup> He had already advised the jury to the effect that petitioner could not be convicted solely on the basis of anything he might have done after the notes reached New York (*supra*, pp. 27-29).

<sup>16</sup> This clearly was not so (R. 344-345).

jury that there could be no conspiracy after the object of the conspiracy had been attained (R. 436). But whether that be so or not, the important fact is that by its failure to say anything more about the matter the court below seems to imply that the jury was left with the impression that it could convict petitioner as a conspirator on the basis of what he had done after the substantive crime was completed. We emphasize this because we think it tends largely to explain why the court below assumed that the instruction shortly to be discussed must be interpreted as permitting conviction if the jury found that petitioner's sole connection with the stolen notes was that he joined in a conspiracy to dispose of them after they had been taken to New York. But it seems unreasonable to assume that the jury, being in the courtroom during the colloquy between the court and counsel, failed to hear the court's statement that conviction could not be predicated on the basis of anything petitioner might have done after the object of the conspiracy was accomplished, i. e., after the notes had been transported to New York.

A minute or two after the colloquy just referred to, the trial judge stated: "I have this note from the jury: 'If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count [conspiracy count].'" To this the judge replied: "Of course if it occurred after-

wards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen.<sup>17</sup> And, just a moment—I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case” (R. 347-348). It is the first sentence of this instruction which the court below assumes had the effect of permitting the jury to find petitioner guilty if all he had to do with the notes was that he joined in a conspiracy to dispose of them after they reached New York (R. 436-437).

But the court below fails to appreciate several factors. It fails to realize, as has been indicated, that but a minute or two before the court had stated in the jury's presence that a conspiracy could not succeed the commission of the crime which was the object of the conspiracy. The object of the conspiracy was, of course, to transport the notes to New York, as the trial judge had made abundantly

<sup>17</sup> The latter part of the instruction is similar to one the trial judge had previously given (R. 343). (See footnote 14, *supra*, p. 29).

clear in its main charge<sup>18</sup> and in one of his supplemental charges.<sup>19</sup> The court fails also to realize that the jury's note was undoubtedly prepared before the jury returned to the courtroom and before it heard the colloquy between the court and counsel which informed it that there could be no conspiracy after the crime which was the object of the conspiracy had ended, the reading of the note being merely deferred during the colloquy (see R. 345-347). The court below further fails to realize that the trial judge had most paintakingly explained to the jury in its main charge that the petitioner must be held guiltless if his participation in the criminal venture did not occur until the notes were brought to New York—"if his dealings with the bonds [were] only after they were transported" (R. 334). Additionally, the court below overlooks the significant fact that in the very instruction under discussion the trial judge told the jury in effect that they could consider petitioner the thief and transporter of the stolen property under certain specified contingencies. It is difficult to see how the jury could

<sup>18</sup> Compare R. 333-335 with R. 330, 332, 333, 335, 337 and 340.

<sup>19</sup> At R. 344 the trial judge stated: "The Government doesn't have to prove that the defendant actually stole these securities and removed them from Minnesota. Or that he actually took them or that he actually brought them to New York. It is sufficient if he were acting in concert with others and someone did it pursuant to the conspiracy and the end in view."



understand that they might convict petitioner as a mere disposer of stolen property following its transportation and at the same time assume that he stole the property and transported it. The two concepts are inconsistent with each other.

We therefore think that the court below makes too much depend upon too little. Just because the jury, in their question, used the expression "the bonds, he [the defendant] aided in disposing of," and the trial judge in answering the question followed the same pattern, the court below attributes to the trial judge, at the very end of the case and but a few moments before the jury retired to consider their verdict, the injection of a completely new and quite unique theory of culpability—the theory that although the crime which was the object of the conspiracy had been consummated, and although the conspiracy itself had ended, the petitioner could nevertheless be held accountable in respect of that conspiracy, on accessory after the fact principles, if he subsequently joined a conspiracy to dispose of the notes. We do not attempt to gainsay the soundness of such a doctrine where a defendant is tried on an accessory after the fact-conspiracy theory; we merely say that the court below attributes too much to the instruction. We think it is fairer to assume that the instruction was just what it appears to be—a quite cursory, last minute, instruction on the question of the necessity of knowledge as to the stolen character of the notes—and noth-

ing more. We think the expression "the bonds, he [the defendant] aided in disposing of" in the jury's question and which fashioned the judge's answer, was but a convenient way of characterizing what was the admitted, and the final, activity of petitioner—his aid in disposing of the notes—and has no other significance. All the instruction directly told the jury was that knowledge that the notes were stolen following this final activity of petitioner was "of course" too late. It said nothing else specifically as to the time of knowledge. It referred only to presumptions, one of which, in so far as it might have a bearing on knowledge, certainly was consistent only with knowledge of the theft at the time of the theft, since it assumed petitioner was the thief. But the trial judge had previously quite explicitly advised the jury that petitioner could not be convicted unless the notes were transported with his knowledge.<sup>20</sup> It obviously was not intended that the instruction should supersede all the prior instructions on knowledge or that in one sentence it should nullify all of the detailed directions to the jury that it must free petitioner if he dealt with the notes only after they arrived in New York, and we think it is too much to assume that the jury so understood. In sum, we believe that the too meticulous reading of the instruction by the court below flies too squarely in the face of repeated prior admonitions of the trial judge, too clear for the jury to

<sup>20</sup> See excerpts at pp. 27-29, 33, *supra*.

misunderstand, that petitioner could not be convicted of conspiracy unless the conspiracy antedated the transportation of the notes.

We are bolstered in our view by the facts that the indictment contains no charge that petitioner was an accessory after the fact<sup>21</sup> and that the term "accessory after the fact" is not mentioned at all either in the main charge or in any of the supplemental instructions. There is no exposition of the principles peculiar to liability on that basis. Indeed, as petitioner correctly indicates, the doctrine first came to light in the opinion below (Br. 16).

While our concession as to the only permissible theory pursuant to which the conviction must be tested makes it impossible to support petitioner's conviction on the alternative basis utilized by the circuit court of appeals, we think the concession must be made in view of the state of the record. The questions, therefore, to which we will confine our discussion are whether there was any substantial evidence to establish that petitioner was a party to an initial conspiracy to transport the notes in interstate commerce or to cause them to be so

<sup>21</sup> It has been held that an accessory after the fact is guilty of a crime distinct from the principal crime (cf. *State v. McAlister*, 139 Kan. 672, 675 (1934); *State v. Phillips*, 136 Kan. 407, 410 (1932); *Reynolds v. People*, 83 Ill. 479 (1876); and the federal accessory-after-the-fact statute emphasizes this distinctiveness by imposing a lesser punishment than in the case of the principal crime (18 U. S. C. 551, copied at p. 32 of the appendix to petitioner's brief).

transported, the only issue submitted to the jury, and whether the overt acts alleged and proved were timely and, as the statute requires, done "to effect the object of the conspiracy."

#### B. THE EVIDENCE AS TO THE CONSPIRACY

The circuit court of appeals, as we understand its opinion, holds that on the basis of the testimony of Chell Smith, the deputy court clerk who identified petitioner as having been in the clerk's office in Minnesota before the theft, there was, as a matter of law, sufficient evidence to justify the inclusion of petitioner as an initial conspirator to transport the stolen notes from Minnesota to New York or to cause them so to be transported. In doing so, however, it assails the credibility of Smith's identification of petitioner (R. 435; see, also, R. 439). Following this lead, petitioner terms Smith a "thoroughly discredited witness" (Br. 4) and argues the case as though the only evidence of what transpired which may be accepted is the version of his connection with the notes the bed-rock of which is contained in his statements to the F. B. I. (Gov. Exs. 69 and 70, R. 371-398), and which he assumes is supported by the testimony of his witness Burns.<sup>22</sup> In brief,

<sup>22</sup> There is nothing else to which petitioner can turn which gives real support to his statement that his participation related "entirely to the disposition of some of the stolen bonds, and had nothing to do with their theft or transportation" (Br. 6).

the story presented in petitioner's statements to the F. B. I. is that Burns brought some of the notes to him in New York and that he aided in disposing of them knowing that they had been stolen by Burns in the West. Both the circuit court of appeals and petitioner assume, evidently, that there was no evidence which had the effect of linking petitioner with a conspiracy which antedated the theft and transportation of the notes except the "unconvincing" testimony of Chell Smith.

We do not deny, of course, that there must be substantial evidence to support a verdict. But we submit there are discrepancies in such material respects between petitioner's statements to the F. B. I. and the pivotal testimony of his witness Burns, as to shatter reliance upon them to support petitioner's version of his participation in the criminal enterprise; that there is lacking any basis for the attack upon the trustworthiness of Chell Smith's testimony; and that both petitioner and the circuit court of appeals fail to take into account the exceptionally strong circumstantial showing which, in our opinion, justified the jury in inferring the existence of a conspiracy preceding the transportation of the stolen notes between petitioner, Burns, and Turley, or, at least, between petitioner and Burns.

(1) To be believable, it would seem that the story petitioner told the F. B. I. should at least harmonize in essential respects with the testi-



mony of his witness Burns, since Burns is the focal point of petitioner's version of what transpired. Petitioner stated to the F. B. I. that some time in January, 1937, Burns advised him that he had \$15,000 worth of Minnesota and Ontario Paper Company notes which he had stolen out West; that Burns solicited his aid in disposing of these notes; that petitioner suggested that the notes should be sold to Turley, and that as the result of a visit to Turley's office the notes were sold through Blaser and Ingalls, Turley being advised that the notes had been stolen out West (Gov. Ex. 69, R. 374-375; Gov. Ex. 70, R. 393-394). Burns supported petitioner to the extent that he testified that he had been in the clerk's office in Minneapolis examining dockets and records on three or four occasions in January, 1937; that he never talked with petitioner prior to the trip about the trip, or during or prior to the trip about Minnesota and Ontario notes; that petitioner was not in Minnesota to his knowledge; and that he did not see petitioner until about a week or two after he returned to New York from the trip (R. 312-315). But, on direct questioning by the court, Burns denied that he had stolen the notes from the clerk's office (R. 319), although petitioner claimed that Burns had said that he had stolen them out West. Burns also stated that he saw petitioner about a week or two after he returned from his trip on January 30 or 31, or February 1 (R. 314-315), whereas petitioner

stated that Burns got in contact with him in January (Gov. Ex. 69, R. 374; Gov. Ex. 70, R. 393). Petitioner, in one of his statements, corroborated the testimony of defendant Jacobson that there was a luncheon meeting between himself, petitioner, Burns and Turley at which the sale of some of the notes was discussed (R. 396), but Burns denied that there had been any such meeting, although his attention was called to what petitioner and Jacobson had said (R. 316-317). Also, Burns categorically denied petitioner's statement that he had aided petitioner in disposing of the twenty bonds stolen from the Delaware court clerk's office (compare R. 317 with Gov. Ex. 70, R. 387-392). Clearly, these discrepancies seriously undermine the credibility of petitioner's defense that he had nothing to do with the stolen notes until Burns brought them from the West. Additionally, petitioner stated that he had the Hart Smith check for the first ten notes (R. 244).

(2) There is no justification, we believe, for the attacks which petitioner and the circuit court of appeals have made in respect of the credibility of ~~Chell Smith's testimony~~. Smith, a deputy clerk in the clerk's office of the Minnesota District Court at Minneapolis, testified that he saw petitioner in the clerk's office in the latter part of January or the early part of February, 1937, and that petitioner was then examining the files

of the Minnesota and Ontario Paper Company reorganization proceeding (R. 29-33, 34-36, 40-42, 44-45, 47, 59; see also R. 310-311). Although conceding that the jury was entitled to believe it if it desired, the court below assails Smith's testimony as having little weight on the question of identification and as being unconvincing (R. 435, 439). The opinion does not disclose the court's reasons for reaching this conclusion and we have failed to discover any real basis for its characterization of the testimony. Unlike men of the caliber of petitioner and Burns, the former a self-confessed thief of the Delaware bonds and also a self-confessed fence in the present case, and Burns a convicted defendant upon the present indictment and an accomplice of petitioner, according to the latter, in the Delaware transaction, Smith was a respectable citizen. He had been connected with the federal district court in Minnesota since 1924; in January, 1937, when he said he saw petitioner in the clerk's office, he was a deputy clerk, and at the time of the trial in November, 1942, he was chief deputy clerk (R. 7, 28, 29). No motive for falsification on his part is discernible. His attention was called to the theft within a few months after it occurred (R. 48-49; 16-17). He testified that petitioner was in the clerk's office on a day during the latter part of January, 1937, or the first part of February, 1937, from between 9 and 10 o'clock in the morning until the middle of the afternoon, and that he

had occasion to observe him several times during this day. On one of these occasions he talked with petitioner for a few minutes (R. 29-30). He described petitioner's wearing apparel at the time (R. 35-36) and asserted that he was quite sure that he was not mistaken as to petitioner's identity (R. 59). Petitioner labels Smith as a "thoroughly discredited witness" upon, apparently several grounds (Br. 4-5). He refers to his cross-examination of Smith (R. 34-56), but so far as we can see all that the cross-examination uncovered were certain minor discrepancies between Smith's testimony at the present trial and that which he gave at the prior trial of petitioner's co-defendants, as well as a haziness as to unimportant details. But it should be remembered that, as Smith himself pointed out, he was testifying to an event which had occurred around five and a half years before (R. 43). While there is some quibbling in the record as to whether Smith at the trial of petitioner's co-defendants stated that he saw petitioner at the Minneapolis courthouse on February 1, 1937, he claimed that he did not say that; that he said the first part of February; he made it clear that he did not feel that he could properly be more definite than that he had seen petitioner in the latter-part of January or the first part of February (R. 34-35, 58-59). Smith certainly cannot be considered as discredited because he testified that he did not see Burns in the clerk's office (R. 33, 399), although Burns stated that he

was there on several occasions in January, 1937 (R. 313). Burns himself testified that he made a practice of going to the clerk's office at lunch time (R. 313), evidently for the purpose of making his appearance as inconspicuous as possible. There is no necessary conflict between the alibi testimony of petitioner's brother and wife to the effect that petitioner was in Shamokin, Pennsylvania, on February 1, 1937. (R. 322-326), and Smith's testimony that he saw petitioner in the courthouse in the latter part of January or the early part of February, 1937. It was not, of course, impossible for petitioner to have made the trip to Minneapolis in the latter part of January, 1937, and still be in Shamokin on February 1. While it is possible, of course, that Smith could have been mistaken in his identification of petitioner, his testimony bears the hallmark of truth, and we consequently feel that we are justified in relying upon it.

(3) The jury had before it direct evidence, in the form of Smith's testimony, that petitioner was in Minneapolis shortly prior to the time he appeared in New York, for the very purpose of examining the file from which the notes were later discovered to be missing. It also had before it the admission of Burns that he was in Minneapolis not long before the notes made their appearance in New York City. Along with these facts, there was a strong circumstantial showing,



not adverted to by petitioner or the court below, which linked petitioner, Burns, and Turley together in a conspiracy to steal the notes and bring them to New York for the purpose of selling them. All three had known each other for some time before the theft and transportation of the notes, and all had offices in New York City, Burns and petitioner together. The relationship between Burns and petitioner was, concededly, particularly close. In 1935 Burns and petitioner, and, apparently, Turley, had participated jointly in a similar transaction whereby bonds were stolen, transported to New York, and sold. If not identical, the method employed was strikingly similar to that utilized in connection with the theft, transportation and disposal of the notes involved in the present case. At about the time petitioner and Burns were in the clerk's office in Minneapolis, Turley received long distance telephone calls from both. Not long after, if not simultaneously with the arrival of the notes in New York City, we find them in the possession of petitioner or Burns or both. We find, also, immediate negotiations to dispose of the notes pursuant to arrangements of such a character as to justify the inference that they must have been made in advance of the arrival of the notes in New York—the renting of an office in the name of Berendson, the printing of letterheads bearing his name (cf. R. 352), the opening of a bank account in his name, the furnishing of references for him, as well as the obtaining of information as to a broker who would purchase these particular se-

curities. Moreover, the proceeds of those notes which the three were able, without mishap, to sell, were divided among them and other defendants who acted jointly in disposing of the notes. And, of course, the jury was entitled to take into consideration such inferences as properly arise from the possession of stolen property. All of this, we think, made out a sufficient showing for the jury to conclude that petitioner, Burns and Turley, and most certainly petitioner and Burns, were parties to an initial conspiracy to steal the notes and to transport them to New York for sale.

It is settled, of course, that a conspiracy need not be proved by direct evidence; it may be inferred from circumstances and the acts of the parties. *Direct Sales Co. v. United States*, 319 U. S. 703, 714; *Glasser v. United States*, 315 U. S. 60, 80; *United States v. Harrison*, 121 F. 2d 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661; *United States v. Manton*, 107 F. 2d 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664. And proof of prior acquaintance and association between the alleged conspirators is competent to show that their entry into the conspiracy charged was not improbable. *Minner v. United States*, 57 F. 2d 506, 510 (C. C. A. 10); *Hood v. United States*, 23 F. 2d 472, 475 (C. C. A. 8), certiorari denied, 277 U. S. 588; *Means v. United States*, 6 F. 2d 975, 977 (C. C. A. 2); *Shea v. United States*, 236 Fed. 97, 103 (C. C. A. 6), certiorari denied, 248 U. S. 581. The verdict of the jury "must be

sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States, supra*, at p. 80.

#### C. OVERT ACTS

The remaining question on this branch of the case is whether the overt acts alleged and proved were timely and whether, within the requirement of the conspiracy statute, they were done "to effect the object of the conspiracy."

It is not disputed that all of the five overt acts charged in the indictment (R. 5-6) were proved and submitted to the jury. Four of the overt acts are conversations in New York City between named conspirators on or about February 3, 5 and 11, 1937, and the fifth alleges that two of the conspirators went to a certain office in New York City on or about February 5, 1937. Overt acts 1 and 2 relate to the disposal or delivery of the fifteen notes sold through defendants Blaser and Ingalls (cf., *supra*, pp. 13-14). Overt act 3 relates to the division of the proceeds of the sale of these notes (cf., *supra*, pp. 14-15). Overt acts 4 and 5 relate to efforts either to obtain collection of the check for the ten notes sold to Hart Smith & Company or to obtain the return of the notes themselves from that firm (cf., *supra*, pp. 10-11). All of the overt acts took place, quite evidently, subsequent to the arrival of the notes in New York.<sup>23</sup>

<sup>23</sup> An overt act is required not only to complete the crime but may be utilized as establishing jurisdiction in the district

The circuit court of appeals regarded the substantive crime and also the conspiracy to commit it at an end "when the notes came to rest in New York", which apparently it considered to be the moment when the notes arrived in New York. But it declared the overt acts to be timely although they were all laid after the notes came to New York because it thought that they were saved by the accessory after the fact-conspiracy doctrine which it felt it could utilize as an alternative basis to support petitioner's conviction (R. 437). We cannot, of course, sustain the overt acts upon that theory, since we do not think the case was submitted to the jury upon such an issue.<sup>24</sup> We do contend, however, that under the theory upon which the case was submitted, i. e., that petitioner was a participant in an initial conspiracy to transport or cause the stolen notes to be transported to New York from Minneapolis, the overt

court. In this case it is a fair inference from the evidence we have heretofore outlined that the conspiracy was entered into in New York City, which was, in itself, enough to confer jurisdiction upon the district court. Proof of the commission of an overt act committed in the district was therefore not required for that purpose, although, of course, such proof fortified the district court's jurisdiction.

<sup>24</sup> Petitioner does not argue in terms of overt acts but would undoubtedly contend that those alleged and proved were inappropriate since it is his argument that the conspiracy was at an end when the notes reached New York. He also contends, of course, that his conviction cannot be sustained because he aided in disposing of the stolen notes, as was held by the court below.

acts may be upheld upon either one of two grounds: (1) The conspiracy did not end with the commission of the substantive offense involved, or (2) the substantive offense endured until the stolen notes were disposed of in New York.<sup>25</sup>

(1) There is substantial authority existing in both the federal and state courts to the effect that the commission of the particular substantive offense involved does not necessarily bring a conspiracy to commit that offense to a conclusion. The broad rationale of these decisions is that a conspiracy may continue until such time as the conspirators have attained the ultimate object, whatever that may be, which led them to the commission of the substantive offense. The doctrine has come before this Court for scrutiny in six cases decided by four different circuit courts of appeals, and this Court has refused certiorari in each instance.<sup>26</sup>

<sup>25</sup> While the trial judge does not indicate in his instructions on what theory he submitted the overt acts to the jury (but cf. footnote 36, *infra*, p. 51), they were all submitted (R. 337; 339-340), and it is not disputed that they were all proved.

<sup>26</sup> *Hudspeth v. McDonald*, 120 F. 2d 962, 966 (C. C. A. 10), certiorari denied, 314 U. S. 617; *McDonald v. United States*, 89 F. 2d 128, 133, 134-135 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Rettich v. United States*, 84 F. 2d 118, 121 (C. C. A. 1); *Laska v. United States*, 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *United States v. McGuire*, 64 F. 2d 485, 493 (C. C. A. 2), certiorari denied, 290 U. S. 645; *Bellande v. United States*, 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607; *Murray v. United States*, 10



To illustrate the doctrine, in prosecutions for conspiracy to transport a kidnapped person in interstate commerce (18 U. S. C. 408a), the conspiracy does not end with the transportation, but continues until the conspirators exchange marked ransom money for unmarked money and divide it. *Hudspeth v. McDonald*, 120 F. 2d 962, 966 (C. C. A. 10), certiorari denied, 314 U. S. 617; *McDonald v. United States*, 89 F. 2d 128, 134 (C. C. A. 8), certiorari denied, 301 U. S. 697;<sup>27</sup> *Laska v. United States*, 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689.<sup>28</sup>

F. 2d 409, 411 (C. C. A. 7), certiorari denied, 271 U. S. 673; *Lew Moy v. United States*, 237 Fed. 50, 52 (C. C. A. 8); *Scott v. State*, 30 Ala. 503, 509-510 (1857); *Hooper v. State*, 187 Ark. 88, 92 (1933); *Comm. v. Stuart*, 207 Mass. 563, 567 (1911); *State v. Thaden*, 43 Minn. 253, 258-259 (1890); *State v. Pratt*, 121 Mo. 566, 572-573 (1894); *O'Brien v. State*, 69 Neb. 691, 693-694 (1903); *People v. Storrs*, 207 N. Y. 147, 157 (1912); *State v. Labywi*, 172 Wis. 204, 206-208 (1920); *Baker v. State*, 80 Wis. 416, 422 (1891); see also Wharton's *Criminal Evidence* (11th ed.), Vol. 2, pp. 1200, 1206; Bishop, *New Criminal Procedure* (2d ed.), Vol. 3, sec. 230.

<sup>27</sup> *McDonald v. United States*: "Whenever the unlawful object of the conspiracy has reached that stage of consummation, whereat the several conspirators having taken in spendable form their several agreed parts of the spoils, may go their several ways, without the necessity of further acts or consultation about the conspiracy, with each other or among themselves, the conspiracy has ended."

<sup>28</sup> *Skelly v. United States*, 76 F. 2d 483 (C. C. A. 10), another kidnapping case, cited by the court below (R. 437), reached the same result upon different reasoning. It ties up exchangers of ransom money for unmarked money in the original conspiracy upon an accessory after the fact theory. It is open to doubt whether under that theory properly ap-

A conspiracy to rob the custodian of mail (1 U. S. C. 320) is not over until there is a final division of the loot. *Rettich v. United States*, 84 F. 2d 118, 121 (C. C. A. 1); *Bellande v. United States*, 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607; *Murray v. United States*, 10 F. (2d) 409, 411 (C. C. A. 7), certiorari denied, 271 U. S. 673.<sup>29</sup> A conspiracy to transport lottery tickets in interstate commerce (18 U. S. C. 387) does not terminate until the conspirators divide the proceeds from the sale of the tickets. *United States v. McGuire*, 64 F. 2d 485, 493 (C. C. A. 2), certiorari denied, 290 U. S. 645. A conspiracy to cause the illegal importation of

plied a new conspiracy would not commence with the accessory acts of the conspirators; whether there is not too much blurring of the distinctiveness of the offenses of principal and accessory after the fact (see footnote 21, *supra*, p. 36). The *McDonald* and *Laska* decisions are not couched in accessory after the fact terminology, but proceed upon the theory that the conspiracy endures *ex propria vigore* beyond the commission of the substantive offense until its ultimate aims are accomplished.

It may be pointed out that, as in the present case (cf. p. 56, *infra*), it was not until after the offenses in the *McDonald*, *Laska* and *Skelly* cases were committed that there were included in the kidnapping statute any specific provisions (18 U. S. C. 408c-1, added by the Act of January 24, 1936) covering offenses subsequent to the actual transportation.

<sup>29</sup> *Bellande v. United States*: "The object of the conspiracy was not accomplished by the mere taking of the mail out of the possession of the carrier, but continued until the robbers and their confederates could have an opportunity to convert it to their own use."

Chinese aliens does not end the instant the aliens are brought across the boundary. *Lew Moy v. United States*, 237 Fed. 50, 52 (C. C. A. 8). And, in the state decisions cited, *supra*, p. 49, it has been held in cases of conspiracies to commit such crimes as larceny, robbery, forgery, or the obtaining of money by false pretenses, that the commission of the substantive offense involved did not mark the end of the conspiracy and that it continued until the conspirators had divided the proceeds of the property which they obtained by committing the substantive offense.

There can be no doubt from the evidence in this case that the purpose of the conspirators was to sell the notes and to divide the proceeds among themselves. If the principle of the decisions to which we have referred is sound, as we believe it to be, it is immaterial when the stolen notes ceased to be in interstate commerce before the conspirators disposed of them and distributed the proceeds (cf. *United States v. Tarley*, 135 F. 2d 867, 870 (C. C. A. 2), certiorari denied *sub nom. Burns v. United States*, 320 U. S. 745), because until those acts occurred the conspiracy continued.<sup>30</sup> On this basis, all the overt acts (see *supra*, p. 46) were

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<sup>30</sup> The trial judge ruled early in the trial that testimony as to a conversation had with one of the conspirators after the notes had arrived in New York was admissible since the "object" of the conspiracy was not achieved until the conspirators had disposed of "the assets" (R. 96-99).

in furtherance of the conspiracy and to effect its objects.<sup>31</sup>

(2) There are, however, other federal decisions representing a narrower view. Some of the same federal courts which have held that a conspiracy does not necessarily come to an end with the commission of the substantive offense charged, have ruled in other conspiracy prosecutions (in none of which was certiorari sought in this Court)

<sup>31</sup> It was not, of course, necessary in order to convict petitioner as an initial conspirator, the issue submitted to the jury, that the indictment allege that it was a purpose of the conspirators to dispose of the stolen notes and to divide the proceeds, even if it be assumed that such an allegation would have been required if the attempt had been made to convict petitioner solely because of his activity in aiding in the disposal of the notes. So far as the overt acts are concerned, it should be pointed out that the objection was not that the overt acts could not be utilized because it was not alleged that the conspirators had in mind the disposal of the stolen notes and the distribution of the proceeds, but solely that the overt acts came too late because the substantive offense and the conspiracy had ended when the notes arrived in New York (R. 309-310). Such an objection could not now be entertained since the evidence discloses beyond question that the conspirators did not have as their only object the mere physical transportation of the notes to New York, but the conversion of the fruits of their crime into that from which they could obtain benefit (cf. *Hagner v. United States*, 285 U. S. 427). In any event, the indictment does not purport to allege all of the objects of the conspiracy since it merely avers that the transportation of the stolen notes was "part of said conspiracy"; as to the overt acts it stated that they were to effect "the objects" of the conspiracy (R. 4, 5). If petitioner had desired further information as to the full scope of the conspiracy, he could have sought a bill of particulars.

that under the conspiracy statute the object of the conspiracy is limited to the commission of the substantive offense, and that with its commission the conspiracy dies. *De Luca v. United States*, 299 Fed. 741, 745 (C. C. A. 2); *Heard v. United States*, 255 Fed. 829, 834-835 (C. C. A. 8); *Fain v. United States*, 209 Fed. 525, 533-534 (C. C. A. 8); *Lonabaugh v. United States*, 179 Fed. 476, 479, 481 (C. C. A. 8); *United States v. Black*, 160 Fed. 431 (C. C. A. 7); see also, *Rose v. St. Clair*, 28 F. 2d 189, 191 (W. D. Va.).<sup>32</sup> In our opinion these cases, in contrast to the cases which hold that the conspiracy endures until the conspirators' ultimate objective has been achieved, take an unrealistic view of that which motivates conspirators. Conspiracies are entered into for the purpose of obtaining some material benefit which the conspirators have in mind. Thus in the instant case it is manifest that the conspirators did not take the securities merely for the purpose of transporting them to another state. Their

<sup>32</sup> In the *Lonabaugh* case, which contains perhaps the clearest exposition of the doctrine, the conspiracy charged was one to defraud the United States of the possession and title to certain of its public lands by means of fraudulent entries under the public land laws. The question was whether the acts of the conspirators in transferring the lands to a corporation after they obtained title to them were overt acts to effect the object of the conspiracy. The court ruled that in the sense of the conspiracy statute the object of the conspiracy was effected when title to the lands passed from the United States, and that when that occurred the conspiracy was at an end.



purpose was to sell the securities so that the fruits of their crime would be available in a utilizable form. The cases which have as their rationale this pragmatic approach do no violence to the conspiracy statute, for they recognize that whatever may be the ultimate object of the conspirators they must also contemplate the violation of a substantive statute. But even if the Court should regard the correct doctrine to be that a conspiracy may not survive the commission of the substantive offense, all of the overt acts, except one, are sufficient. For, we submit, interstate transportation of stolen securities does not necessarily end the instant the securities arrive in the state to which the offenders have taken them; at least, in this case, in which the evidence discloses a manifest purpose on the part of the offenders from the beginning to take the securities from Minnesota to New York in order to sell them in New York, which they soon did, it would not ordinarily be denied from a common sense, practical standpoint that the property has moved in a continuous current from the files of the court in the one state to their ultimate purchasers in the second state.

In the case of the ordinary interstate commercial movement of goods it is well recognized by the decisions of this Court that a temporary pause in their transit does not terminate their interstate journey; that until the goods reach those for whom they are intended, the continuity of movement con-

tinues; that the standard to be applied is a practical and not a formal one. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 568; *Binderup v. Pathe Exchange*, 263 U. S. 291, 309; see also, *McLeod v. Threlkeld*, 319 U. S. 491, 495; *Kirschbaum Co. v. Walling*, 316 U. S. 517, 520; *Swift & Co. v. United States*, 196 U. S. 375, 396; *De Loach v. Crowley's Inc.*, 128 F. 2d 378, 379 (C. C. A. 5).

"The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.' " *Binderup v. Pathe Exchange*, *supra*. Of course, the instant case does not involve the ordinary commercial interstate movement of goods from manufacturer to ultimate consumer. But the realities of the situation are, we think, little different. The facts are such as to warrant the inference that when the conspirators placed the notes in the channels of interstate commerce, it was their intention to have them reach purchasers in New York. When the notes reached New York, they did not "come to rest" so as to break the interstate movement; they were not commingled in the general mass of securities in New York. Their movement was only temporarily interrupted for the period required to find purchasers, and, in fact, they were transported by the conspirators to the purchasers. In respect of stolen automobiles transported in interstate commerce in violation of the National Motor Ve-

hicle Theft Act (18 U. S. C. 408), the prototype of the present statute,<sup>33</sup> the fact that the automobile "rests" in the state to which it has been transported for a brief period during which the defendant seeks to dispose of it, does not terminate its movement in interstate commerce. *Levi v. United States*, 71 F. 2d 353, 354 (C. C. A. 5); *Loftus v. United States*, 46 F. 2d 841 (C. C. A. 7); *Wilkerson v. United States*, 41 F. 2d 654, 655-656 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Farris v. United States*, 5 F. 2d 961 (C. C. A. 7). By the same token, interstate movement of the stolen notes continued until at least they reached the brokers who bought them from the conspirators, and not, as the court below, in effect, held (R. 437) and petitioner assumes, when the notes arrived in New York. The statute itself as it was amended on August 3, 1939, c. 413, 53 Stat. 1178, recognizes that the interstate movement may in some situations continue until the process of disposition, for in Section 2, which amended Section 4 of the original statute, it provides for the punishment of "Whoever shall \* \* \* barter, sell, or dispose of" stolen securities, etc., "moving as \* \* \* interstate \* \* \* commerce". (18 U. S. C. 416). Obviously, if the conspiracy did not come to an end until the notes reached the hands of the brokers who purchased them, i. e., until their dis-

<sup>33</sup> The National Stolen Property Act is entitled "An Act to extend the provisions of the National Motor Vehicle Theft Act to other stolen property."

position, the event which marked the end of the interstate journey,<sup>34</sup> all of the overt acts, except the third, which related only to the distribution of the proceeds of fifteen of the notes (*supra*, p. 46) were not only timely but necessarily furthered the object of the conspiracy since they related to the "final step in the use of interstate transportation". See *Brooks v. United States*, 267 U. S. 432, 439.<sup>35</sup>

<sup>34</sup> *Gable v. United States*, 84 F. 2d 929 (C. C. A. 7), cited in petitioner's brief (p. 12), does not purport to deal with the question as to when transportation in interstate commerce of stolen securities ends. There, as here, the appellant was charged with conspiring to transport stolen securities (Government bonds) in interstate commerce. The only question involved was whether the proof established the conspiracy charged. The court pointed out that the only proof was "that after the bonds had been stolen and transported and delivered to [appellant] he agreed, for a commission, to dispose of the same." The court held that this was not proof of the conspiracy charged for "The record is devoid of any evidence that appellant had any understanding or agreement, tacit or otherwise, looking toward the stealing of the bonds, transportation of the same, or delivery of the same after transportation." Whatever relevance the case has lies in its implication that a conspiracy of the type here involved may endure beyond the actual physical transportation of the stolen securities. The court was not, of course, required to be nice in its explanation as to how long such a conspiracy may have life, because, as it held, the proof did not disclose that appellant had entered into a conspiracy of the character charged.

<sup>35</sup> This is certainly true as to Overt acts 1 and 2, which related to the disposal and delivery of fifteen of the notes. It would also seem to be true as to Overt acts 4 and 5, which related to efforts to realize on the check which Hart Smith

IT WAS NOT ERROR, IN VIEW OF THE EVIDENCE AND THE ISSUES SUBMITTED FOR THE JURY'S DETERMINATION, TO CHARGE THE JURY THAT THE RECENT UNEXPLAINED POSSESSION OF STOLEN PROPERTY IN ANOTHER STATE THAN THAT IN WHICH IT WAS STOLEN RAISES A PRESUMPTION THAT THE POSSESSOR WAS THE THIEF AND TRANSPORTED THE STOLEN PROPERTY IN INTERSTATE COMMERCE

Petitioner also contends (Br. 19-24) that the circuit court of appeals should not have held that error which it found in the trial court's final supplemental instruction to the jury was not reversible error (see R. 450).

Reverting again to the final supplemental instruction, the trial court stated (R. 347):

I have this note from the jury: "If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count" [the conspiracy count].

The court then charged (R. 347-348):

Of course if it occurred afterwards it would not make him guilty, but in that

& Company had given for ten of the notes or else to get back the notes themselves so that, evidently, they could be sold to someone else (*supra*, p. 46).

If the interstate transportation of the notes continued until their disposition, clearly it was unnecessary to allege that it was an object of the conspiracy to dispose of them. Cf. footnote 31, p. 52; *supra*.



connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce; but that such presumption is subject to explanation and must be considered with all the testimony in the case.

The circuit court of appeals held that the instruction was proper in so far as it charged the jury that knowledge that the notes were stolen could be inferred from possession of the notes shortly after their theft, a matter which the trial judge had previously charged at greater length (see R. 343). But it held that it was wrong to tell the jury that the possession of the notes raised a presumption that petitioner was the thief and had transported them in interstate commerce, although it admitted that the trial judge had borrowed the instruction from the court's earlier decision in *Drew v. United States*, 27 F. 2d 715. It rationalized its current holding that the presumption was wrong, as we understand the opinion, in this way: Preliminarily, it assumed for the purpose of argument, as it had in *United*

*States v. Crimmins*, 123 F. 2d 271, that it is not necessary in a prosecution for the substantive offense to prove that an accused who knows that the securities have been stolen, also know that they are being moved in interstate commerce, and fortified its assumption by reference to its holding in *Rosen v. United States*, 271 Fed. 651, where it ruled that such knowledge was not necessary in the case of receivers of stolen property. But it said that there can be no doubt that knowledge by the accused that the goods are being moved in interstate commerce is necessary to a conviction for conspiring to transport, since no agreement can go beyond the terms of the confederates' mutual understanding (R. 437-438).

The court then turned to the *Drew* case, which was an appeal from a conviction for the substantive offense of transporting a stolen automobile from New Jersey to New York, to demonstrate that when it said in that case that recent possession of the stolen car raised a presumption that the accused was the thief and had transported the car to New York, it had pronounced a dictum, saying that it was quite unnecessary in that case to say anything more than that possession raised a presumption of knowledge of the theft because "other evidence in the record proved that the stolen car had been transported from New Jersey; patently it had been brought from that state. That was enough, for the accused, once knowl-

edge was brought home to him that the goods were stolen, was guilty either as the thief, or \* \* \* as accessory after the fact under § 551 of Title 18, U. S. C." The court then proceeded to denounce as unreasonable "any presumption" from the possession of stolen goods "that they have in fact been transported in interstate commerce." While it thought that it was less unreasonable to say, when the goods have in fact been transported in interstate commerce, that possession raises a presumption that their possessor knew that they had been so transported, it stated that it did not say that in the *Drew* case, and that even if it had, it would have been without support in the authorities, and as an original proposition it could not be defended at least in a case such as that which the court assumed, evidently, it had before it, i. e., the case of one whose only connection with stolen negotiable securities was to aid in the disposal of them knowing that they had been stolen. Thus, the court said: "It is of course possible that, a man, dealing in stolen securities, and knowing or suspecting that they have in fact been stolen, may inquire where the seller got them; but it is more likely that he will not wish to do so. Inquiry is apt to add to that information, any evidence of which he will at all hazards wish to suppress; it will be safer to take the securities as they are presented, than to meddle into their source." The court then proceeded to overrule

what it deemed to be its dictum in the *Drew* case as an inadvertence (R. 437-438).

The court next turned, in the last paragraph of its original opinion, to the question whether the error which it found in the charge required reversal. It stated that the only evidence that the accused knew where the notes had come from was the testimony of Chell Smith, which it said was unconvincing, and which it thought probable that the jury did not believe, for otherwise it would not have brought in a verdict of acquittal on the substantive count. Hence, it concluded that as to a "constituent element of the conspiracy—knowledge of the place of the theft", there was good reason to assume that the jury relied upon the presumption, with the result that a reversal and a new trial must follow (R. 439). However, following a petition by the Government for rehearing (R. 440-446), the court modified the last paragraph of its opinion and affirmed the judgment of conviction. The court pointed out that the Government had called its attention to the fact that there was other evidence than the testimony of Chell Smith that petitioner knew that the notes had come from another state; and the court then referred to the statement of petitioner to the F. B. I. that he knew that the notes had come from the West (see p. 15, *supra*), and a concession in petitioner's brief on the appeal that he knew that Burns had obtained the notes in

the West. The court concluded that "In the face of that statement and that concession it would be altogether unwarranted to reverse the judgment because of the mistake in the charge \* \* \*"  
(R. 450).

Before discussing the decision of the circuit court of appeals it would seem advisable first to dispose of several of petitioner's contentions. In his brief in this Court petitioner assumes without argument that the charge was erroneous, as was held by the circuit court of appeals, but he contends that that court erred in holding that it was harmless in the present case because "It is just as baseless, in our opinion, to presume that a defendant has transported property in interstate commerce, when he is ignorant that it was stolen outside of the state, as when he knows it was so stolen" (Br. 23). It is unnecessary to deal with such a contention since it is clear, from the court's opinion, that it intended completely to reject the presumption which the trial court gave the jury and made no distinction between a situation where the possessor knew that the goods had come from beyond the state and that where he did not have such knowledge. All the Court ultimately concerned itself with was whether, where stolen negotiable securities have in fact been transported in interstate commerce, the "less unreasonable" presumption that the possessor knew that the securities had been so transported was reasonable



in the case of one who merely dealt in the stolen securities knowing them to have been stolen, a category the court, apparently, assumed that petitioner was in. Its holding was that even such a presumption could not be sustained (R. 438), but that the error in charging the presumption was negligible for the reason stated *supra*, pp. 62-63.

Petitioner also argues that the presumption was "at war" with the jury's verdict on the substantive count to the effect that petitioner was not the thief and did not transport the notes in interstate commerce and undoubtedly led to his conviction on the conspiracy count (Br. 23). Of course if the presumption is a proper one it applied both to the conspiracy count and the substantive count. It would seem that it should have had an even more persuasive effect upon the jury with reference to the substantive count than in respect of the conspiracy count. It may be also added that, as has been pointed out (*supra*, p. 26), consistency in the verdict is not required and that the verdict was undoubtedly a compromise one because, as the trial judge indicated, if the evidence justified conviction on the conspiracy count it also warranted conviction on the substantive count.

Turning now to the decision of the circuit court of appeals, it is here also necessary to attempt to clarify the question actually presented.

## A. THE QUESTION INVOLVED

1. Evidently speaking of its decision in the *Drew* case the court below says: "Certainly it is untenable to say that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce" (R. 438). It should be emphasized, because of its bearing in the present case, that no such presumption was applied in the *Drew* case, which, as we have said, was a prosecution for the transportation of a stolen automobile in interstate commerce. The presumption there applied was the same as that involved in this case, i. e., that from the unexplained possession of stolen property in another state shortly after the theft it may be presumed that the possessor was the thief and transporter of the stolen property in interstate commerce. In neither case was the presumption utilized to prove the fact of interstate transportation. There was undisputed evidence in the *Drew* case, as the court below itself seems to recognize, that the stolen automobile was transported in interstate commerce (R. 438). In this case, likewise, the evidence makes it clear that the stolen securities were transported in interstate commerce. We agree that it would be unreasonable to infer merely from the fact of possession that the stolen goods had been transported in interstate commerce. Such a presumption

would be as unjustified as were the statutory presumptions rejected by this Court in *Tot v. United States*, 319 U. S. 463.<sup>28</sup>

2. The circuit court of appeals, apparently (R. 438), as well as petitioner (Br. 23), assume that the presumption must be tested on the basis that we have here merely the case of one whose only relationship to stolen negotiable securities was that he dealt in them after they had been transported, knowing that they had been stolen. We have heretofore considered at length the several factors on which this assumption is based (*supra*, pp. 37-45). It suffices now to say that on the basis of evidence which the trial judge deemed as justifying him in concluding that a sufficient case had been made to link petitioner with the criminal enterprise in the beginning, and we believe properly so, the judge submitted the case to the jury on two charges, (1) that petitioner had himself transported the stolen securities in interstate commerce or caused them to be so transported, and (2) that he was a party to an initial conspiracy to accomplish the transportation. This excluded any idea that he could be held culpable on the

<sup>28</sup> In that case statutory presumptions created by the Federal Firearms Act were: That, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce and (2) that such receipt occurred after July 30, 1938, the effective date of the statute.

basis of being a mere receiver or disposer of stolen securities after they had been transported interstate. It is easy to see how the court below rationalized that a presumption that the possessor was the thief and had transported the property interstate could not stand in such a case. Obviously, the very concept that the defendant's only relationship to the crime was that he received or disposed of the stolen securities after their transportation negates the assumption that he was the thief and the transporter. Nor do we need to quarrel with the proposition that what the court terms the more reasonable presumption—that the possessor knew that the stolen property had been transported in interstate commerce<sup>37</sup>—may not be defended in the case of a mere dealer in stolen negotiable securities. It may be, as the

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<sup>37</sup> The court undoubtedly concerned itself ultimately not with the presumption actually given to the jury, which it rejected, but with a presumption that the possessor knew that the stolen property had been transported interstate because, as it had previously said, the conspiracy charged—a conspiracy to transport in interstate commerce—necessarily encompasses knowledge that the goods are to be transported interstate (R. 437). The court apparently reasons that to tell the jury that the possessor of stolen property in a state other than that in which the property was stolen was the thief and the transporter of the property in interstate commerce is also to tell them that the possessor knew that the property had been transported interstate (cf. R. 439) and, transposing this into conspiracy law, that it may further be assumed that those who associated themselves with the possessor have like knowledge, assumptions which would not appear unreasonable.

court below says (R. 438), that it would be unreasonable to assume that he would inquire where the stolen securities came from, as it would be safer for him not to do so. But these are not problems which we have in this case. Here the presumption must be applied in a situation where there was evidence connecting petitioner with the criminal venture *ab initio*, and the questions presented for jury consideration were whether the defendant himself transported or caused the stolen notes to be transported in interstate commerce and whether he was a party to a conspiracy to do these things. The precise question then is whether it is unreasonable in such situations to indulge in a presumption that the possessor was the thief and transported stolen notes in interstate commerce where it is clear that the securities were stolen and turned up in the defendant's possession in another state within a short time after the theft.<sup>28</sup>

<sup>28</sup> The theft of the notes from the clerk's office in Minneapolis was discovered in April, 1937 (*supra*, p. 8). There was evidence placing petitioner in the clerk's office during the latter part of January or the first part of February, 1937 (*supra*, p. 8, and Burns conceded that he was in the clerk's office in January, 1937 (*supra*, p. 16). If petitioner was Berendson, the notes were in his possession in New York possibly as early as January 31, 1937, but not later than February 3, 1937 (*supra*, pp. 8-9). In any event, even under petitioner's version of his connection with the notes, fifteen of the notes were in his possession not later than February 7, 1937 (*supra*, pp. 13-14, 15).



## B. THE VALIDITY OF THE PRESUMPTION

In the recent decision of this Court in *Tot v. United States*, 319 U. S. 463, the test laid down in determining the validity of presumptions is whether there is any "rational connection between the fact proved and the ultimate fact presumed" (p. 467). The presumption is to be rejected only "if the inference of the one [fact] from proof of the other is arbitrary because of lack of connection between the two in common experience" (pp. 467-468). While the *Tot* case involved statutory presumptions there can be no doubt that the same rule applies to nonstatutory presumptions. The multitude of such presumptions in which the law indulges—the presumption of innocence, sanity, the regularity of official acts, etc.—all have their foundation in experience, the course of human conduct, or the connection usually found to exist between certain things. Absent such foundation there cannot be a presumption of the kind here involved. Wharton's *Criminal Evidence* (11th Ed.) Vol. 1, p. 72.

We are not here concerned with something completely novel in the field of presumptions. In case after case involving prosecutions for larceny it has been held that the recent unexplained possession of stolen goods gives rise to a presumption that the possessor is the thief.<sup>39</sup>

<sup>39</sup> See, e. g., *Edwards v. United States*, 139 F. 2d 365, 368-369 (App. D. C.), certiorari denied, 321 U. S. 769; *Tracten-*

The analogy of the presumption in the case of larceny to that involved in this case is closer even than may superficially appear. Since it is an essential element of larceny not only that there be a taking but also some asportation of the goods (Wharton's *Criminal Law* (12th ed.) Vol. 2, sec. 1163; Miller, *Criminal Law*, p. 362), when it is assumed that the possessor is the thief it is also necessarily assumed that he was the asporter. But of course it is not necessary in larceny to infer that the possessor took the goods over a state line since jurisdiction does not depend upon any such element. Nothing more is inferred

*berg v. United States*, 293 Fed. 476, 478-479 (App. D. C.); *Boehm v. United States*, 271 Fed. 454, 457 (C. C. A. 2); *Taylor v. State*, 35 Ariz. 317, 320 (1929); *Thomas v. State*, 175 Ark. 279, 282-283 (1927); *People v. Melson*, 84 Cal. App. 10, 16 (1927); *State v. Raymond*, 46 Conn. 345 (1878); *Tucker v. State*, 57 Ga. 503 (1876); *People v. Garkus*, 358 Ill. 106, 111 (1934); *Waters v. People*, 104 Ill. 544, 548 (1882); *Smith v. State*, 58 Ind. 340, 344 (1877); *State v. Bohall*, 207 Ia. 219, 221 (1928); *State v. Brown*, 25 Ia. 561, 565-566 (1868); *Lewis v. State*, 4 Kans. 296 (1868); *Davidson v. Commonwealth*, 219 Ky. 251, 252-253 (1927); *State v. Merrick*, 19 Me. 398, 400 (1841); *State v. Wagner*, 211 Mo. 391, 403 (1925); *State v. Williams*, 54 Mo. 170 (1873); *State v. Moore*, 124 Ore. 61, 70 (1928); *Odum v. State*, 116 Tex. Cr. Rep. 622, 624 (1930); *Criner v. Town of Vinton*, 161 Va. 987 (1933); *State v. Costin*, 46 Wyo. 463, 469 (1934); see also *Dunlop v. United States*, 165 U. S. 486, 502.

The presumption has also been applied in burglary where the breaking, as is usual, was committed with the intent to steal. *McNamara v. Henkel*, 226 U. S. 520, 524-525; see also Wharton's *Criminal Evidence*, op. cit. *supra*, sec. 191.

than is necessary. The presumption, evidently rational and valid when applied to larceny, that the possessor is the thief, is certainly not stretched beyond reason when, as applied to federal statutes aimed at thievery but necessarily limited, for jurisdictional purposes, to the offense of the transportation interstate of the stolen property, it is assumed also that the thief has brought the property from the state in which it is stolen to the state in which it is found in his possession. If it is not unreasonable to assume that the possessor of the stolen goods was the thief, it is no more unreasonable to assume that he took them from the place where they were stolen to the place where they were found in his possession.

We consequently believe that the court below either misunderstood the *Drew* decision or else was wrong in overruling it. There is clearly no basis for the court below to hold that its statement in the *Drew* case as to the presumption was a dictum. In that case the defendant was prosecuted under the National Motor Vehicle Theft Act for transporting a stolen automobile from New Jersey to New York knowing it to have been stolen. The evidence established that the car was stolen in New Jersey and found twelve days later in the possession of the defendant in New York. It was contended by the defendant that there was

no evidence of transportation by him. But the court below held that his possession of the stolen vehicle so soon after it was stolen raised a presumption that he was the thief and had transported it to New York; that it was a question for the jury to determine whether this inference of guilt was overcome by the defendant's explanation of his connection with the stolen car. It accordingly approved a charge by the trial judge which evidently embodied the presumption. We cannot comprehend how the court below can say, as it did in this case, that it was quite unnecessary in the *Drew* case to say anything more than that the possessor of the stolen car knew that it was stolen. As we have indicated (*supra*, p. 65) the inference was not used, as the court below seems to think, to establish that the car was transported in interstate commerce. "Certainly," as that court said, "it is untenable to say that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce." The issue presented for the jury's consideration in the *Drew* case was whether the defendant transported the car from New Jersey to New York. The presumption was utilized as an aid in establishing that he did. The court below says in this case that it was enough in the *Drew* case to make the defendant guilty, either as a thief or as an accessory after the fact, that the defendant knew the car was stolen in New Jersey.

"other" evidence<sup>40</sup> in the record proving that the stolen car had been transported from New Jersey. But these proved nothing more than that the car had been transported in interstate commerce and that the defendant knew it was stolen. They certainly did not prove that the defendant was the thief, or the transporter. And clearly the crime with which the defendant was charged and of which he was convicted was not that he was an accessory after the fact, but that he was the one who transported the stolen vehicle, and hence was a principal.

The *Drew* case is, we submit, a sound decision and has been cited and followed not only in later decisions by the same court, but also in decisions by another circuit court of appeals in cases in which the defendants were prosecuted either for the interstate transportation of stolen property or for conspiracy to commit that offense. *Petrilli v. United States*, 125 F. 2d 101, 103 (C. C. A. 8), certiorari denied, 317 U. S. 657; *United States v. Seeman*, 115 F. 2d 371, 374 (C. C. A. 2); *Husten v. United States*, 95 F. 2d 168, 170 (C. C. A. 8); *United States v. DiCarlo*, 64 F. 2d 15, 17 (C. C. A. 2). The *Drew* decision was utilized in these cases on the question as to whether the defendant transported the stolen property in interstate commerce and not, as the court below believed (R. 438), solely

<sup>40</sup> Presumably the court means evidence other than the presumption which it had erroneously assumed to be a presumption that the car had been transported in interstate commerce.



in connection with a presumption that the defendant had knowledge that the property was stolen.

The presumption, as the authorities indicate, raises merely an inference of fact; it is rebuttable; the inference together with such explanation as the defendant may have made is to be considered by the jury in connection with all the evidence in the case; the Government is not relieved of the necessity of proving that the property was stolen and transported in interstate commerce, nor of its general burden of proving the defendant guilty beyond a reasonable doubt. The presumption was submitted to the jury in this case in the customary terms. The trial court consequently did not err in instructing the jury as to the presumption.

Initially, the circuit court of appeals considered the error prejudicial because it regarded the presumption as supplying the evidence upon which the jury determined that petitioner knew where the stolen notes came from. It thought the only evidence on the subject was Chell Smith's testimony, which it considered unconvincing and which it felt that the jury must have disbelieved since it acquitted petitioner on the substantive count (R. 439). When its attention was called by the Government, on petition for rehearing, to the statement of petitioner to the F. B. I. that he knew that the notes came "from the West" and

to the concession in petitioner's brief on appeal that he knew that Burns had obtained the notes in the West, it concluded that the error was inconsequential and did not warrant reversal (R. 450). While the presumption does not speak in terms of knowledge by petitioner that the stolen notes were transported in interstate commerce,<sup>41</sup> it may well have that tendency since presumably one who steals securities and transports them in interstate commerce knows that he is so transporting them.<sup>42</sup> If it does have such a tendency, it was of course permissible for the jury to draw such an inference, since the presumption was properly before it for the purpose of its determination as to whether the notes were stolen by petitioner and whether he transported them in interstate commerce. It is not denied, of course, that petitioner as well as the other initial conspirators had to intend that the stolen notes be transported in interstate commerce, as their agreement had to encompass such an understanding to be within the statute. But it should be pointed out that, in addition to the presumption, if it has a bearing on the subject, there was abundant evidence from which the jury could conclude that petitioner was

<sup>41</sup> Indeed, as to the substantive count the court below, we think correctly, assumes that petitioner did not have to know that the stolen notes were being moved in interstate commerce (R. 437).

<sup>42</sup> See footnote 37, *supra*, p. 67.

a party to a conspiracy which had as its objects the theft of the notes from the clerk's office in Minneapolis and their transportation to New York for the purpose of disposal—the testimony of Chell Smith identifying petitioner as having examined the file in the clerk's office in which the notes were kept prior to the theft; the testimony of Burns placing himself in the clerk's office before the theft; the admissions of petitioner that he knew the notes came from the West; and the strong collocation of circumstances which link petitioner, Burns and Turley, or, at least, Burns and petitioner with the criminal venture from the beginning.

### III

#### THE NOTES SATISFIED THE STATUTORY REQUIREMENT AS TO VALUE

Petitioner's final contention (Br. 24-28) is that the statutory requirement that the stolen property have a value of \$5,000 or more (see p. 3, *supra*) was not satisfied. The stolen notes had a face value of \$25,000 and were sold on the New York market to brokerage houses for \$6,500 shortly after their transportation (pp. 7-8, 9, 13, *supra*). Nevertheless, petitioner argues that within the meaning of the statute the notes had no value. He first endeavors to demonstrate (Br. 24-25) that when the notes were stolen they were valueless "pieces of paper" because the obligations which

they had originally evidenced no longer existed, having been merged in the claims filed by the noteholders in the reorganization proceeding of the issuing corporation and allowed by the reorganization court. Having thus shown that the notes had no value in this sense, petitioner asserts (Br. 26-28) that until the amendment of the statute in 1939 (Act of August 3, 1939, c. 413, secs. 1-6, 53 Stat. 1178-1179, 18 U. S. C. 415-419), the National Stolen Property Act proscribed only the interstate transportation of stolen securities that were genuine and valid.

The circuit court of appeals did not question petitioner's argument that the notes had only a factitious value,<sup>43</sup> but concluded that, nevertheless, they were within the statute. The court observed that the statute covered "falsely made, forged, altered or counterfeited securities" and reasoned that "it can scarcely have been the purpose of Congress to exclude a security, originally valid, but later merged in a claim, and yet to include securities void from their inception" (R. 434). Petitioner assails this ruling on the ground that the quoted provision was added to the statute in 1939, after the offense was committed. This is

<sup>43</sup> Presumably, the court meant in stating that the value "was factitious, and would not have survived a full disclosure of the facts" (R. 435) that the purchasers did not know that proofs of claim had been filed and allowed.

true." Petitioner, however, overlooks the fact that Section 2 (b) of the original Act in defining "securities", the transportation of which was prescribed, included "any forged, counterfeited, or spurious representation" (*supra*, p. 3).<sup>45</sup> Thus, it is clear that at no time has the statute been limited in its application to valid securities.

Obviously, a "forged, counterfeited, or spurious representation" of a security can have no real value. Nevertheless, their interstate transportation, if stolen and if they had a "value" of \$5,000 or more, was punishable under the original statute, as it now is. Manifestly, in the case of such documents, value can mean only face value, par value, or market value, if they should be sold. These are the criteria now embodied in the statute by the amendments of 1939, that the value of securities "shall be considered to be the face, par, or market value, whichever is the greatest." (Act of August 3, 1939, *supra*, sec. 3; 18 U. S. C. 417.) And, the amendment would appear merely to state explicitly that which was implicit in the statute

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<sup>45</sup> There was added, *inter alia*, to Section 3 of the Act a clause making it an offense to "transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited" (Act of August 3, 1939, *supra*, sec. 1; 18 U. S. C. 415). Under this clause it is immaterial that the securities do not have a value of \$5,000 or more, or that they have not been stolen.

<sup>46</sup> The 1939 amendments of the statute did not change Section 2 (b).



prior to its amendment. Since the statute interdicts the transportation of void securities, having no real value, it can hardly be argued that Congress meant to exclude securities originally valid, but which, when transported, have only a fictitious value for the reasons stated by petitioner, particularly where the securities have been sold for an amount in excess of \$5,000.

Furthermore, it would seem perfectly clear that the allowance of a claim filed by a holder of securities of a corporation in reorganization does not invalidate the securities. While it may be that the allowance of a claim has the effect of a judgment as between the debtor and his creditor, and also that a cause of action is merged in a judgment, as the cases cited by petitioner hold (Br. 24-25), none of those cases hold that the allowance of a claim makes the security invalid or valueless. It is common knowledge that there is constant trading in the securities of corporations undergoing reorganization,<sup>40</sup> a recognition of which appears in the Bankruptcy Act. Thus, Section 212 of the Act empowers the judge in a reorganization proceeding in certain circumstances to "limit any claim or stock acquired \* \* \* in the course of the proceeding \* \* \* to the actual consideration paid therefor", and Section 249 of the Act forbids compensation for services rendered or reim-

<sup>40</sup> The record discloses an active market in the notes (R. 101-103).

bursement for expenses incurred in a reorganization proceeding to persons acting in a fiduciary capacity who have acquired or transferred claims against or stock of the corporation after the commencement of the proceeding (Act of June 22, 1938, c. 575, sec. 1, 52 Stat. 895, 901; 11 U. S. C. 612, 649). See *Otis & Co. v. Insurance Bldg. Corporation*, 110 F. 2d 333 (C. C. A. 1).

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1945.

# SUPREME COURT OF THE UNITED STATES.

No. 41.—OCTOBER TERM, 1945.

Chester G. Bollenbach, Petitioner,	}	On Writ of Certiorari to
vs.		the United States Circuit
The United States of America.		Court of Appeals for the Second Circuit.

[January 28, 1946.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The petitioner was convicted of conspiring to violate the National Stolen Property Act. The Circuit Court of Appeals for the Second Circuit sustained the conviction. We brought the case here, 324 U. S. 837, because it was submitted to the jury in a way that raised an important question in the administration of federal criminal justice.

The relevant facts upon which decision must turn are these. Bollenbach, the petitioner, and others were indicted upon two counts: for transporting securities in interstate commerce knowing them to have been stolen (48 Stat. 794, 18 U. S. C. § 415; 35 Stat. 1152, 18 U. S. C. § 550) and for conspiring to commit that offense (35 Stat. 1096, 18 U. S. C. § 88). Having been granted a severance, Bollenbach was tried separately. No doubt the securities had been stolen in Minneapolis and were transported to New York. And it is not controverted that Bollenbach helped to dispose of them in New York.

The question is whether he was properly convicted under the indictment. The trial lasted seven days. After the jury had been out seven hours they returned to the Court to report that they were "hopelessly deadlocked". Interchanges then ensued between court and jury and between court and counsel. One of the jurors asked "Can any act of conspiracy be performed after the crime is committed?" The trial judge made some unresponsive comments but failed to answer the question. No exception was noted immediately. In a few minutes the jury left, but after twenty minutes again returned for further instructions. Bollenbach's counsel then indicated that the court had left the bench too hurriedly to enable him to except to the judge's failure to answer the question. After an exception was

then taken and allowed, the judge "mistakenly replied", as the lower court noted, "that he had already told them that there could be no conspiracy after the object of the conspiracy had been attained."

After indulging in further colloquy with counsel, not here pertinent, the judge stated that he had this note of inquiry from the jury: "If the defendant were aware that bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?" In answer the judge instructed the jury as follows: "Of course if it occurred afterwards it would not make him guilty but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case." Counsel for the accused excepted to this charge, but the judge cut short an attempted request by counsel with the remark, "You may except to the charge but I will not take any requests." The jury filed out and returned five minutes later with a verdict of guilty on the second—the conspiracy—count. A sentence of two years and a fine of \$10,000 were imposed. The Circuit Court of Appeals reversed the judgment and ordered a new trial. It found error in the charge just quoted. "Certainly it is untenable to say" was the crux of its holding, "that the possession of stolen goods raises any presumption that they have in fact been transported in interstate commerce." 147 F. 2d 199, 202. And it held that it could not disregard the error because of the questionable evidence as to whether the accused knew that the bonds had come from another State. But on rehearing the Court's attention was called to the fact that, after his arrest, the accused admitted that he knew that the bonds had come from the West and that he may have had that knowledge before he disposed of them. On further consideration of the bearing of this evidence upon the defendant's knowledge of the place of the theft, the Circuit Court of Appeals changed its view and held that "it would be altogether unwarranted to reverse the judgment because of the mistake in the charge". 147 F. 2d at 202.

That Court evidently felt free to disregard "the mistake in the charge" only on its assumption that Bollenbach could be convicted under this indictment as an accessory after the fact. But Bollenbach was neither charged nor tried nor convicted as an accessory after the fact. The Government did not invoke that theory in the two lower courts and disavows it here. And rightly so. The receipt of stolen securities after their transportation across State lines was not a federal crime at the time of the transactions in question, and we need not consider the scope of a later amendment making it so. See Act of August 3, 1939, 53 Stat. 1178, 18 U. S. C. § 416; H. R. Rep. 422, 76th Cong., 1st Sess. (1939); and S. Rep. 674, 76th Cong., 1st Sess. (1939). Bollenbach could not properly be convicted for the offense for which he was charged and for which he was convicted, namely, for having conspired to transport securities across State lines merely on proof that he was a "fence", i. e., helped to dispose of the stolen securities after the interstate transportation was concluded. While § 332 of the Criminal Code, *supra*, made aiders and abettors of an offense principals, Congress has not made accessories after the fact principals. Their offense is distinct and is differently punished. (§ 333 of the Criminal Code, 35 Stat. 1152, 18 U. S. C. § 551).

We are therefore thrown back upon an appraisal of what the Circuit Court of Appeals deemed a mistaken charge in the proper setting of this case.

The Government does not defend the "presumption" as a fair summary of experience. It offends reason, so the Government admits, as much as did the presumption which was found unsupportable in *Tot v. United States*, 319 U. S. 463, even though that was embodied in an Act of Congress. Instead, the Government in effect asks us to pay no attention to this palpably erroneous answer by the judge to the jury's inquiry as to guilt on the charge of conspiracy to transport stolen securities "If the defendant were aware that the bonds which he aided in disposing of were stolen". We can pay no attention to this misdirection only by assuming that the jury paid no attention to it and that the case is before us as though no misdirection had been given. To do so is to disregard the significance of the course of events, as revealed by the record, after the case went to the jury.

The Government suggests that the judge's misconceived "presumption" was "just what it appears to be—a quite cursory, last-



minute, instruction on the question of the necessity of knowledge as to the stolen character of the notes—and nothing more." But precisely because it was a "last-minute instruction" the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were "hopelessly deadlocked" after they had been out seven hours. "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U. S. 466, 469. "The influence of the trial judge on the jury is necessarily and properly of great weight", *Starr v. United States*, 153 U. S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.

An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming. The jury was obviously in doubt as to Bollenbach's participation in the theft of the securities in Minneapolis and their transportation to New York. The jury's questions, and particularly the last written inquiry in reply to which the untenable "presumption" was given, clearly indicated that the jurors were confused concerning the relation of knowingly disposing of stolen securities after their interstate journey had ended to the charge of conspiring to transport such securities. Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be "quite cursory" in the circumstances in which the jury here asked for supplemental instruction. But he was not even "cursorily" accurate. He was simply wrong.

The Circuit Court of Appeals read the judge's charge to mean that the jury was permitted to find Bollenbach "guilty of a conspiracy to transport stolen goods if he joined in their disposal after the transportation had ended". We so read it. That Court, as we have seen, properly rejected the propriety of leaving the case to the jury as the trial judge had left it, but sustained the conviction on its own accessory-after-the-fact theory. Compelled to repudiate this theory, the Government now seeks to sustain the conviction on the afterthought that the charge did not mean what it said, and that, while the jury asked one question, the trial judge replied to another. Here then are three different and conflicting theories regarding a charge designed to guide the jury in determining guilt, and yet we are asked to sustain the conviction on the assumption that the jury was properly guided. The Government contends that the court below failed to appreciate several factors in regard to the criticized charge. What reason is there for assuming that the jury did not also fail to appreciate these factors which the Government, in an elaborate argument, explains as requisite for a proper understanding of that which at best was dubiously expressed? A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks.

The Government argues that the sting of error is extracted because there was proof, other than the erroneous "presumption", on the issue of Bollenbach's participation in the wrongdoing before the transportation of the stolen securities had ended. This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after

their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous "presumption" given them as a guide. A charge should not be misleading. See *Agnew v. United States*, 165 U. S. 36, 52. Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. See Thayer, *Preliminary Treatise on Evidence* (1878) Chaps. 8 and 9; Wigmore, *Evidence* (3d ed., 1940) §§ 2490-2540; Morgan, *Some Observations Concerning Presumptions* (1931) 44 Harv. L. Rev. 906; Denning, *Presumptions and Burdens* (1945) 61 L. Q. Rev. 379. In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those "technical errors" which "do not affect the substantial rights of the parties" and must therefore be disregarded. 40 Stat. 1181, 28 U. S. C. § 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The "technical errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, *Administration of Criminal Law* (1905) 15 Yale L. J. 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. *Bruno v. United States*, 308 U. S. 287, 293-94; *Weiler v. United States*, 323 U. S. 606, 611.<sup>1</sup> From presuming too often all errors to be "prejudicial", the judicial pendulum

<sup>1</sup> Compare the applications by the English courts of a similar provision in the Criminal Appeal Act, 1907: *Maxwell v. Director of Public Prosecutions*, [1935] A. C. 309; *Rex v. Leckey*, [1944] 2 K. B. 80; *Rex v. Slender*, 26 Crim. App. Rep. 155 (1938); *Rex v. Redd*, [1923] 1 K. B. 104; *Rex v. Watson*, [1916] 2 K. B. 385; *Rex v. Ahlers*, [1915] 1 K. B. 616; *Rex v. Thompson*, [1914] 2 K. B. 99; *Rex v. Edwards*, [1913] 1 K. B. 287; *Rex v. Rodley*, [1913] 3 K. B. 468; *Rex v. Ellis*, [1910] 2 K. B. 746; *Rex v. Dyson*, [1908] 2 K. B. 454; cf. *Bray v. Ford*, [1896] A. C. 44. And see *Makin v. Attorney General*, [1894] A. C. 57, construing a similar provision in the Criminal Law (Amendment) Act, 1883.

need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

*Judgment reversed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES.

No. 41.—OCTOBER TERM, 1945.

Chester G. Bollenbach, Petitioner, } On Writ of Certiorari to  
vs. } the United States Circuit  
The United States of America. } Court of Appeals for the  
Second Circuit.

[January 28, 1946.]

Mr. Justice BLACK, dissenting.

*Tot v. United States*, 319 U. S. 463, held that the mere possession of a pistol coupled with conviction for a prior crime was not evidence proving that the pistol had been shipped or transported in interstate commerce. I agree with the government's contention that the trial court's charge in this case does not conflict with the *Tot* holding. For the trial court did not charge the jury that interstate transportation of the stolen securities could be inferred from their mere possession in New York. In fact, the undisputed evidence showed that the securities, stolen in Minnesota, turned up in the petitioner's possession in New York very shortly after the theft. No evidence was offered to explain this possession of the stolen goods. Under these circumstances the trial judge rightly charged the jury that the unexplained possession of stolen property shortly after the theft was sufficient to justify a finding that the petitioner not only knew that the bonds were stolen but that he was the thief. Such seems to have been the established rule of law since time immemorial.<sup>1</sup>

Never until today has this Court cast any doubt on the existence or soundness of the rule. In fact it has recognized or expressly approved it as proper in cases involving larceny, *Dunlop v. United States*, 165 U. S. 486, 502; burglary, *McNamara v. Henkel*, 226 U. S. 520, 524-525; arson, *Wilson v. United States*, 162 U. S. 613, 617, 619, 620; and even murder, *ibid.* And in the *Wilson* case, *supra*, this Court approved a charge by the trial court using substantially the same language as to "presumption", which the trial

<sup>1</sup> See the cases collected in notes on *Hunt v. Commonwealth*, 70 Am. Dec. 447-452, *State v. Drew*, 101 Am. St. Rep. 481-524.



court here used.<sup>2</sup> There is no reason which I can conceive, and the court offers none, why the sensible and long-established rule should be appropriate in all kinds of cases except the one before us. Certainly evidence of the theft of the bonds and their transport in interstate commerce with knowledge of the theft, was relevant on both counts of the indictment, the first charging the theft and transportation, and the second charging conspiracy to commit the crime. And these relevant facts were capable of proof by circumstantial evidence to the same extent as to each count. The "unexplained possession" rule is in substance a circumstantial evidence rule. The experience of ages has justly given this particular type of circumstantial evidence a high value. In my opinion the trial court's charge insofar as it stated that unexplained possession of the stolen bonds raised a "presumption" that petitioner was the thief, was a correct statement of law under our former decisions. The Court's opinion does not explicitly repudiate this part of the trial judge's instruction but it seems to me that such repudiation is implicit in the Court's reasoning.

There is some indication in the Court's opinion that it thought the entire answer to the jury's question erroneous because it was misleading. The only reason, I can imagine, why the Court's

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<sup>2</sup> The Court's charge here condemned was that unexplained possession "raised a presumption". It may be, although I am not sure, that the condemnation rests on the use of the word "presumption" instead of "inference". And it is true that fine-spun refinements have been invented in efforts to distinguish "presumptions" from "inferences", cf. *N. Y. Life Insurance Co. v. Gamer*, 303 U. S. 161, 175-177. But I am sure that this jury was not familiar with the dialectics which sought without success to deliver these metaphysical distinctions from foetal darkness. And the notes already cited, as well as many cases, have shown that no such practical distinction exists. See e. g. *United States v. Di Carlo*, 64 F. 2d 15, 17; *United States v. Seeman*, 115 F. 2d 371, 374. That the trial judge treated a "presumption" as an inference, just as any juror would, is shown by an earlier part of his charge as follows: "It is the law that the unexplained possession of stolen property shortly after the theft is sufficient to justify the conclusion by a jury of knowledge by the possessor that the property was stolen." And it is interesting to note that this court said in the *Wilson* case, *supra* at 619-620; that "In *Rickman's* case, 2 East P. C. 1035, cited, it was held that on an indictment for arson, proof that property was in the house at the time it was burned, and was soon afterwards found in the possession of the prisoner, raised a probable presumption that he was present, and concerned in the offence; and in *Rez v. Diggle*, (Wills Cir. Ev. \*53,) that there is a like presumption in the case of murder accompanied by robbery. Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with its legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict." (Italics supplied.)

answer, stating this well-established rule, could be thought misleading, is that the answer was in response to a question on the conspiracy count. Thus the Court may be saying that the jury might have believed from the trial court's instructions that unexplained possession is not only proof that petitioner was the thief but also is in and of itself proof that he was a conspirator. In view of the fact that the judge previously fully instructed the jury on conspiracy, I do not think it either possible or probable that the jury was misled in the way indicated. But my objection is chiefly to the Court's repudiation, either partial, or complete, of a rule which permits courts and juries to draw perfectly justifiable inferences from proven facts.

Nor do I think the trial judge was wrong in instructing the jury that the unexplained possession in New York of the securities recently stolen in Minnesota justified an inference that the petitioner had transported them in interstate commerce. If this possession in New York justified an inference that he had stolen the securities in Minnesota, I fail to see why it does not also justify the inference that he carried them to New York. Can it be said that there is a presumption that he stole them in Minnesota and then passed out of the picture while the stolen goods were carried to New York, and that the jury was compelled to attribute his possession in New York to something as indefinite as an "Act of God or the public enemy"? The very presumption of theft has to carry with it the presumption of transportation. Thieves do not remain at the scene of their crime. The classical definition of larceny contains the phrase "a felonious taking and carrying away".

The Bill of Rights is improperly invoked to support the Court's holding in this case. It contemplates that a defendant shall have a fair trial; but it does not command that juries shall be denied the right to draw the kind of inferences from admitted facts that all people of reasonable understanding would draw. I assume that if these bonds had been stolen in Minneapolis, Minnesota, at 6 A.M., and this petitioner had turned up with them just outside the New York airport at 12 o'clock noon of the same day, a reasonable person could not only infer that he had stolen them, but also that he had transported them. The only difference between drawing an inference of transportation in that case and the one before

us is that the inference of transportation here might not be quite so overpowering. But it is none the less a reasonable one.

The trial judge's oral charge to the jury was clear, fair, correct, and unchallenged. I disagree with the Court's censure of his additional instructions.<sup>3</sup> The jury's verdict, given after a fair trial, was supported, if not compelled, by the evidence. It is, in my judgment, a disservice to the administration of criminal law to reverse this case.

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<sup>3</sup> This Court reads the trial judge's charge to mean that Bollenbach was "guilty of a conspiracy to transport goods if he joined in their disposal after the transportation had ended." The trial judge actually charged the jury thus: "If the participation of this defendant in this was subsequent, that is, that he did not know that they were transported, that is, if he did not transport them or cause them to be transported himself, of course there would be no offense. That is, if the bonds arrived in New York and he had nothing to do with transporting or causing them to be transported there would be no offense." Later the jury asked the judge this question: "If the defendant were aware that the bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?" The judge's reply so far as relevant to this particular question was: "Of course if it occurred afterwards it would not make him guilty." Not one word and not one intimation have I been able to discover in the instructions to the jury to the effect that Bollenbach could be convicted if he had done no more than join in disposal of the bonds after their transportation had ended.